92-70

No. _____

Supreme Court, U.S.
FILED
JUL 7 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES STEEL CORPORATION,

Petitioner,

v.

ANDREW CARTER, A MINOR BY HIS PARENT AND NATURAL GUARDIAN, DONALD CARTER AND DONALD CARTER IN HIS OWN RIGHT,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Although The 7th Amendment Does Not Apply To The States, Once A State Elects To Employ A Civil Jury System Does The Due Process Clause Of The 14th Amendment Mandate That The Jury Be Impartial?

2. Where A Jury Has Been Exposed To A Highly Prejudicial News Account In A Civil Case And Admits That It Was Not Able To Remain Impartial, Does The Due Process Clause Mandate A New Trial Or (At A Minimum) An Opportunity For The Trier Of Fact To Make A Determination As To Prejudice?

3. Did The Pennsylvania Supreme Court Violate The Due Process Clause of The 14th Amendment When It By-Passed The Trial Court's Determination Of Prejudice And Supplanted It With An *Ad Hoc* Determination Unsupported By The Factual Record, Resulting In A Civil Jury That Was Not Impartial?

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OPINIONS BELOW

The Opinion of the Pennsylvania Supreme Court reversing the finding of "prejudice" by the trial court and Superior Court (en banc) was issued on March 6, 1992. (App. at 1).

The Opinion of the Pennsylvania Superior Court (en banc) upholding the trial court's finding of prejudice and grant of new trial was issued on January 4, 1990. (App. at 25).

The Opinion of the Court of Common Pleas of Allegheny County (trial court), finding that the jury was

prejudiced and ordering a new trial was issued on October 30, 1987. (App. at 73).

JURISDICTION

The Opinion of the Pennsylvania Supreme Court was issued on March 6, 1992. The Order of the Pennsylvania Supreme Court denying Reargument was issued on April 9, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Due Process Clause of the 14th Amendment to the United States Constitution, set forth verbatim in the Appendix at 143. It also, secondarily, involves the 7th Amendment to the United States Constitution, set forth verbatim in the Appendix at 143.

STATEMENT OF THE CASE

This case raises novel and important questions concerning the right to an impartial jury trial in civil cases. Recognizing that the 7th Amendment is one provision of the Bill of Rights which has not been incorporated into the 14th Amendment and thus does not directly apply to the states, the question becomes – *once a state elects to employ a jury trial scheme,* do fundamental notions of due process require a basic level of impartiality in the jury?

Put in more specific terms, is the 14th Amendment due process clause violated when a state trial judge determines that a television broadcast has seriously and

irreversibly prejudiced the jury with respect to a corporate defendant; yet the state Supreme Court by-passes this ruling; announces a new standard of "prejudice"; refuses to remand the case back to the trial judge for his determination as to the impartiality of the jury; and then proceeds to make a factual determination as to prejudice which has no basis in the record?

The instant tort action was commenced in a Pennsylvania trial court on behalf of Andrew Carter – at that time a minor – in 1984.[1] Carter was seriously burned on the evening of June 1, 1984 (he was then fourteen years old) when he accepted a dare and climbed a 146-foot electrical tower at U.S. Steel's Carrie Furnace plant on the Monongahela River near Pittsburgh, at dusk. Despite a pervasive recession in the steel industry throughout the United States, the Carrie Furnace plant – in operation for three quarters of a century – remained partially open. After scaling Tower No. 13D to a platform at the 135-foot level, Carter and his co-trespasser – Christian Stonebreaker – decided to venture to the far edge of the platform, as darkness fell. When the two boys ducked under four grayish-colored uninsulated wires, Stonebreaker heard a sudden "crackling" sound. He turned to see Carter receive a charge of electricity through his hand, where Carter had grasped a high-voltage wire. A bright electrical flash was emitted from Carter's hand, right shoulder, and left foot. Carter collapsed onto the platform, where he lay motionless for some minutes until he regained consciousness. Stonebreaker then assisted Carter (who

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[1] Andrew Carter is now 22 years old.

was partially delirious) back down the Tower to the ground, where the two boys went for help.

Carter was hospitalized for several months as a result of the burns sustained while climbing the electrical Tower. Ultimately, his left hand, a small toe, and part of his left foot were amputated.

At the time of trial in 1987, Carter admitted that he was aware that he was trespassing on U.S. Steel property; his parents had warned him to stay away from "unsafe" areas; he had seen and read the "Danger – High Voltage" sign attached to the Tower's substation; he and Christian Stonebreaker had previously trespassed on the property five or six times; he had abandoned an earlier attempt to climb the Tower out of fear; and he and Christian Stonebreaker had specifically discussed the fact that the wires might be "energized". Despite all of this, Carter explained that he had succumbed to the tauntings of Stonebreaker on this occasion, who had called him "chicken" and dared him to climb the electrical tower on the evening of the accident.

Following a week-long trial in the Court of Common Pleas of Allegheny County, the case was submitted to a 12-person jury for deliberation on the afternoon of February 12, 1987. The trial judge, Zeleznik, J., permitted the jury to return home at 4:00 p.m. – less than an hour after deliberations had begun – with instructions to resume the following morning.

Upon returning to his law office, counsel for U.S. Steel discovered that the East Suburban edition of the Pittsburgh Post Gazette – the morning newspaper of general circulation in Pittsburgh – had run an article entitled "Parents Sue USX (U.S. Steel) Over Boy's Mill Death." The story explicitly referred to Carter, U.S. Steel, and the

instant action by name. It reported that, subsequent to the Carter accident, another incident had occurred on the same Carrie Furnace property on October 4, 1986, in which a 16-year-old boy named Orlando Dudley was killed by electrocution when he climbed a similar (but not identical) Tower in order to cut and remove copper wire with a hacksaw. The article stated that the Complaint in the Dudley case alleged that "USX was negligent in not posting Danger signs at (the Carrie Furnace Mill)," and that "USX knew the wires were dangerous because of the Carter electrocution at the mill in 1984." The article described the two cases as "similar", intertwined discussion of both cases as if they were a pair, and disclosed that the Carter case was currently on trial before Judge Zeleznik.

That same evening (within hours after the jurors had returned home), a broadcast appeared on the 6:00 p.m. newscast of Pittsburgh television station WTAE-TV (Channel 4). That broadcast showed footage from the Dudley accident, including dizzying shots of the Tower – virtually identical to the one Carter had climbed – filmed from the base looking straight upward. The footage revealed the body of Orlando Dudley on the platform (presumably at the time he died), with a man unsuccessfully attempting to resuscitate him. A female paramedic was shown climbing the Tower with great trepidation; at the base of the Tower a cluster of ambulances and rescue vehicles flashed red lights; one ambulance was backed up to the Tower with its doors thrown open; as onlookers watched helplessly. The newscast described the Dudley fatality as being "similar" to the Carter case, and stated as follows: "(Well Tonight), The Parents of An

Electrocuted 16 Year Old (Boy) Are Suing USX Corporation. Orlando Dudley Died October 4th, When He Touched A Live Wire In The Carrie Furnace Mill. The North Braddock Boy Was Searching For Copper Wire. His Parents Claim USX Was Negligent Because It Did Not Warn Of Electrical Dangers. They Say The Company Should Have Posted Danger Signs After Another Boy Lost A Hand and Part Of His Foot In A Similar Accident In 1984 - (An Electrocution There At The Same Time). A Lawsuit On That Incident Is Being Heard Now In Allegheny County Court."[2]

The following morning - February 13th - counsel for U.S. Steel immediately informed the trial court of the highly prejudicial newspaper article and television broadcast. A conference was held in the judge's chambers; a court reporter was summoned to transcribe the proceedings. Counsel for U.S. Steel contended that the news reports were patently prejudicial. He requested that the judge poll the jury, and determine if any of them had "heard anything or read anything" about the Carter case in the newspaper or otherwise. Plaintiff's counsel, on the other hand, adamantly argued that the jury should not be interrupted in its deliberations. The trial court stated:

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[2] The typewritten version of the television station's newscast - presumably from a teleprompter - omits certain words actually uttered by the newscaster. Such omissions are included here in parentheses. The complete videotaped version of the newscast has been filed with this Court for its review, in conjunction with the Petition for Writ of Certiorari. There is no indication that the Pennsylvania Supreme Court ever reviewed this videotape, upon which the entire issue of prejudice revolves.

"It is an unfortunate incident and its timing is something that really irritates me." (App. at 117). He stated that, if he had known such inflammatory publicity would occur: "I would have kept them all night, if necessary, put them up in a hotel and let them continue this morning without – I would have sequestered them." (App. at 118). Nevertheless, the trial court made the decision to "let the matter roll, let the jury resume deliberation without any interference at this time," (App. at 118), because the issue might ultimately become "moot" if there were a defense verdict. At the same time, the trial judge made clear that if the issue were not eventually mooted, he intended to meet individually with the jurors in order to determine if there was any "jury tampering or undue influence." (App. at 118).

With this ruling issued, counsel for U.S. Steel placed on the record an oral motion for a mistrial, based upon the patently prejudicial nature of the news reports. (App. at 115). Counsel further indicated that he would file a written motion for mistrial at the earliest opportunity. (It is significant that the trial judge earlier had granted U.S. Steel's Motion in Limine excluding all evidence of subsequent accidents at the Carrie Furnace site – including the Dudley fatality – recognizing the obvious prejudicial effect of such information).

Two hours later, after going forward with deliberations, the jury rendered a verdict against U.S. Steel in the amount of $1.5 million. This verdict was molded to $1.2 million by the trial judge to reflect Carter's 20% negligence as found by the jury. (The current value of the judgment, including post-judgment interest, is now approximately $2 million). After the verdict was read – *but before the verdict was recorded* – the trial judge called

each juror into his chambers (in the presence of both counsel) in order to inquire about the media reports.

All twelve jurors stated that the news reports had been discussed in the jury room. Jurors #5 and #8 had viewed the television report on the 6:00 p.m. news, and had openly discussed the newscast with other jurors during deliberations. Jurors #4, #8 and #10 all volunteered information that they had been unable to base their verdict strictly upon the evidence of record, and indeed had changed their votes directly due to the news account. In response to a direct question from the trial judge as to whether she had been able to base her verdict "strictly on the law that I gave to you and the evidence you saw and heard in this case in the courtroom," Juror #8 responded: "No." She stated: "Yesterday, yes. Before I saw the news my verdict was different." (App. at 132). "I changed (my opinion) when I saw the news on Channel 4 yesterday." (App. at 133). Juror #10, in response to an identical question from the trial judge, volunteered: "I voted different yesterday than I did this morning. I changed my vote this morning," based upon the television account. (App. at 135).[3] Juror #1, the foreperson, stated that she

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[3] The vote to find liability on the part of U.S. Steel was 11-1, with juror #9 voting for a defense verdict. (App. at 134). Thus, at least four jurors volunteered to the court that they would have voted for a defense verdict were it not for the news accounts. This result would not have satisfied the Pennsylvania Constitutional mandate that not less than five-sixths of the jury must agree on a verdict in order to find a defendant civilly liable. (Pa. CONST. art. 1, § 6). Indeed, only eight jurors would have voted to hold U.S. Steel responsible for the accident; a minimum of ten is required under the Pennsylvania Constitution. Thus, U.S. Steel would have received a defense verdict or (at a minimum) a new trial.

had not considered in any fashion the news account discussed in the jury room, but then asked the trial judge whether it was Christian Stonebreaker (i.e. Carter's friend) "that got killed up there on that tower . . . ?" (App. at 123).

After conducting a limited inquiry (during which at least three jurors blurted out that they had been unable to reach a verdict based upon the evidence of record after being exposed to the news account), the trial court recorded the verdict and dismissed the jury. Thereafter, he granted U.S. Steel's written Motion for a New Trial. In his opinion, Judge Zeleznik concluded that a new trial was warranted because *"every litigant has a right to a trial by jury that is impartial and indifferent, based only on evidence carefully brought before it during trial and the law as read to it by the Court."* (App. at 81, emphasis added). Judge Zeleznik found that the television broadcast – observed by two jurors and discussed openly by all jurors during the course of deliberations – was highiy prejudicial for four reasons:

1. The identical matter had been addressed in an earlier Motion in Limine filed by U.S. Steel, which prohibited any testimony about the Dudley boy's death or any subsequent accidents at the Carrie Furnace site. The court had granted this Motion in Limine, precisely because of the potentially devastating effect such information would have upon the jurors.

2. The audio-visual context of the newscast exacerbated the prejudice. The footage showed highly inflammatory scenes of the Dudley boy's death, and cited the lack of safety precautions adopted by U.S. Steel following a "similar" accident – likening the Carter case to the Dudley fatality. This "raise(d) an immediate adverse

inference as to defendant's contempt for the lives of trespassing children." (App. at 86).

3. Plaintiffs' counsel, in his closing argument, had raised the very issue as to "whether the defendant's apparent lack of concern should go unpunished," emphasizing the threat to the community posed by the danger of other accidents to other children, the precise theme which the newscast emphasized in an emotion-charged fashion.

4. The trial court himself had given no special cautionary instructions, because the jury had already begun its deliberations and he had made the decision not to interrupt them.

Judge Zeleznik concluded that: "We believe this television broadcast to be of such a damaging nature that (an) ordinary instruction would not overcome the prejudicial effect." (App. at 86). He therefore ordered a new trial.

The Pennsylvania Superior Court, sitting *en banc*, affirmed the trial court. Disregarding the in-chambers testimony of the jurors as to the *effect* of the news reports upon their deliberations – under the long-standing principle that juries cannot impeach their own verdicts – the Superior Court nonetheless concluded that "it is clear that the jury's receipt of the evidence of the subsequent accident at Carrie Furnace Works was prejudicial." (App. at 31). Since the information concerning the Dudley case was made known to the jury outside of the evidence properly introduced in the courtroom, without any special cautionary instructions, the Superior Court concluded: "(W)e find that the media reports were prejudicial and destroyed USX's chance for a fair trial." (App. at 32).

Despite these rulings, and the lack of any determination that the trial judge had "abused his discretion", a bitterly-divided Pennsylvania Supreme Court reversed both the Superior Court and the trial court. Justice Rolf Larsen authored the majority opinion, joined by a single Justice. This opinion announced a new standard for determining "prejudice" in Pennsylvania; and then (inscrutably) went on to make its own set of factual findings, ignoring the facts as found by the trial court, and refusing to remand the case back to the trial judge – who was most intimately familiar with the circumstances surrounding the prejudicial news account – for a determination under the new standard. Two Justices concurred in the result, without explanation.

The majority opinion (curiously) did not disagree with the trial court with respect to the most critical issue. The majority agreed that in-chambers testimony regarding the fact that the jurors were *exposed* to the televised news report and had *discussed* it during deliberations was properly received by the trial court. This testimony related to *overt conduct* of the jury, and was properly admissible to determine the "likelihood of prejudice." (App. at 10-13). The majority went on to enunciate, however, a new test for determining whether a "reasonable likelihood of prejudice" existed, holding that the trial judge should consider three factors: 1) whether the extraneous influence relates to a central issue in the cases or merely involves a collateral issue; 2) whether the extraneous influence provided the jury with information they did not have before them at trial, and; 3) whether the extraneous influence was emotional or inflammatory in nature. (App. at 13).

Ironically, the trial judge had already (in effect) ruled upon each of these three factors in his thorough opinion. Nonetheless, the four-justice majority of the Pennsylvania Supreme Court ignored the trial court's determination of prejudice; ignored the determination by the factfinder that a new trial was essential to ensuring U.S. Steel an impartial jury; ignored the fact that its own newly-enunciated three part standard required the trial judge – the individual most directly familiar with the facts and circumstances – to make the determination as to prejudice; and shortcut its own test by concluding in a truncated fashion that "there was no reasonable likelihood of prejudice arising from the instant broadcast." (App. at 16). The majority of the Pennsylvania Supreme Court refused to remand the case for a new trial, or even (at a minimum) to send the case back to the trial judge for an explicit ruling according to the majority's new three part test. Rather, the majority by-passed all semblance of due process by substituting its own unsupported view of "prejudice" for that of the factfinder, and thus transformed the right to an impartial jury into an appellate creation of whim, obliterating U.S. Steel's opportunity for a civil trial untainted by inflammatory news accounts.

Three members of the Court vigorously dissented. Justice Flaherty, joined by Chief Justice Nix and Justice McDermott, argued that the majority had misapplied its own three part rule, and had stripped the trial judge of his ability to determine the facts as to prejudice and impartiality. The dissent concluded that *prejudice under any standard* had been established in the lower court and U.S. Steel had been denied due process: "[T]he inflammatory nature of this information is precisely why the trial

court, correctly, excluded it from evidence (in the first place)." (App. at 22).

Immediately following the issuance of the Pennsylvania Supreme Court's decision, U.S. Steel filed an Application for Reargument. U.S. Steel contended that the majority's decision had utterly disregarded the findings of the trial judge; had failed to apply its own standard; had emasculated the clear factual determination that the jury verdict had not been impartial; and had thus violated U.S. Steel's "fundamental rights to a fair trial" which constituted an "impermissible denial of due process," all in violation of the Pennsylvania and the United States Constitutions. (App. at 115-118).[4]

The Pennsylvania Supreme Court denied U.S. Steel's Application for Reargument on April 9, 1992.

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[4] U.S. Steel raised the due process/impartial jury issue from the earliest stages at trial, once the jury's exposure to the news broadcast was discovered. Thus, U.S. Steel asserted that the news broadcast was "severely prejudicial" and made a "fair trial impossible," both during trial (Transcript of Proceedings) and in post-trial motions (Motion for Post-Trial Relief, Motion for Mistrial). (App. at 102, 105, 115, 118). The true due process violation did not occur, however, until the Pennsylvania Supreme Court rendered its decision and by-passed the trial court's ruling of prejudice and order of new trial. Thus, in its Application for Reargument, U.S. Steel explicitly stated that the decision of the majority had violated its "fundamental right to a fair trial," and constituted an "impermissible denial of due process." (App. at 92-99).

REASONS WHY THE PETITION SHOULD BE GRANTED

I. Although the 7th Amendment Does Not Apply To The States, Once A State Elects To Employ A Civil Jury System, Due Process Mandates That The Jury Be Impartial.

It was fifty years ago that this Court engaged in the *Palko-Adamson* dispute, in which Justices Cardozo, Frankfurter and Black (among others) spiritedly debated whether the entire Bill of Rights was meant to be incorporated into the 14th Amendment.[5] Since that time, most of the first eight Amendments have been "selectively incorporated" into the due process clause by successive decisions of this Court. *See* TRIBE, *supra*, at 772-774. The instant Petition for Writ of Certiorari is not designed to reopen the incorporation debate. To the contrary, this Petition raises a novel question not yet addressed by this Court; that is, at what point does the right to civil jury trial afforded by states (albeit voluntarily), intersect with the federal guaranty of due process (which is mandatory), such that the federal Constitution will invalidate a state trial which fails to maintain impartiality in the jury?

The earliest decisions of this Court following the adoption of the 14th Amendment make clear that the right to jury trial in civil cases – embodied in the 7th Amendment – is federal in application only, and does not apply to the states. *See Walker v. Sauvinet*, 92 U.S. (23

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[5] *See Palko v. Connecticut*, 302 U.S. 319 (1937); *Adamson v. California*, 332 U.S. 46 (1947). For a general discussion of the "incorporation" dispute, *see* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 772-774 (2d ed. 1988).

Wall.) 90, 92-93 (1875); *Minneapolis & St. L.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916). Indeed, trial by jury in civil actions in state courts may be modified by a state or abolished altogether. *See Wagner Electric Manufacturing Company v. Lyndon*, 262 U.S. 226, 232 (1923); *Palko*, 302 U.S. at 324 (1937) (Cardozo, J.). More recent decisions of the Courts of Appeals have re-affirmed this basic proposition and have remained undisturbed by this Court. *See, e.g., Woods v. Holy Cross Hospital*, 591 F.2d 1164, 1171 n.12 (5th Cir. 1979); *Olesen v. Trust Company of Chicago*, 245 F.2d 522 (7th Cir. 1957), *cert. denied*, 355 U.S. 896 (1957).

At the same time, a host of decisions of this Court – as well as the writings of scholarly commentators – have treated the matter of impartiality as a separate issue. As one commentator in the Cornell Law Quarterly wrote: "Although a state need not provide trial by jury, if it chooses to do so, the Constitution requires the trial to be fair, and impartiality is the test of fairness." Comment, *The Impartial Jury – Twentieth Century Dilemna*, 51 CORNELL L. REV. 306, 306 (1966).

This Court in both criminal and civil contexts has noted that the due process clause of the 14th Amendment – quite apart from the 7th Amendment – requires impartiality in judges and juries. "Due process," this Court wrote in *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912), "implies a tribunal both impartial and mentally competent to afford a hearing." Or again, this Court stated in *In Re Murchison*, 349 U.S. 133, 136 (1955): "A fair trial in a fair tribunal is a basic requirement of due process." As Mr. Justice Murphy stated in *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946): "The American tradition of trial by jury, considered in connection with either criminal or

civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community."

The fundamental premise of this Petition is that, once the Commonwealth of Pennsylvania establishes a system of civil jury trials under Article 1, Section 6 of its own Constitution, the due process clause of the 14th Amendment of the United States Constitution mandates that such juries be impartial. This is no different than the mandate that a state employing civil trials presided over by judges (in lieu of a jury system) ensure impartiality in the judiciary. It is furthermore the premise of this Petition that the jury trial in question – due to the highly prejudicial nature of the news account viewed by two of the jurors and discussed openly in deliberations – patently lacked impartiality. The splintered majority of the Pennsylvania Supreme Court thus violated the 14th Amendment when it overturned the lower courts' command of a new trial, rendered its own determination as to "lack of prejudice" without any basis in the record, and refused to remand the matter to the trial judge who was stripped of his function as factfinder.

A. History Of Jury Trials In The United States; A Prelude To Impartiality As An Element Of Due Process.

The Constitutional requirement that states must maintain impartial juries – pursuant to the due process clause of the 14th Amendment – necessarily flows from the history of jury trials generally in the United States.

Sir William Blackstone called the jury trial "a trial that hath been used time out of mind in this (English) nation and seems to have been coeval with the first civil

government thereof." 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349-450, *quoted in* Robert White, *Origin and Development of Trial By Jury*, 29 TENN. L. REV. 8, 9-10 (1961). The notion of a jury trial as a *right* of citizens first appeared in the 29th chapter of the Magna Charta, which stated that no freeman shall be hurt in either his person or property *"nisi per legale judicium parium suorum vel per legem terrae"* ("save by the judgment of his peers or by the law of the land.") JOHN PROFFATT, A TREATISE ON TRIAL BY JURY 36-37 (1880). Thus, the early American colonists brought with them a deep notion of entitlement to trial by jury; a notion which incorporated an expectation of impartiality. Indeed, the first surviving piece of legislation from the Plymouth colony was a regulation requiring trial by jury in both civil and criminal matters, with the jury to consist of "twelve honest men." PROFFATT, *supra*, at 122 (citing 1 Palfrey's New England at 340).[6]

It was for these reasons that trial by jury was, in the phrase of Alexander Hamilton, "the very palladium of free government" in the newly constituted nation. *See Galloway v. United States*, 319 U.S. 372, 398 (1943) (Black, J., dissenting). It was for the same reason that the issue of adding a civil jury trial guarantee to the Constitution was one of the most volatile issues of the state ratification conventions, nearly leading to the defeat of the proposed

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[6] Pennsylvania's original Constitution, adopted on September 28, 1776 – ten years before the adoption of a federal Constitution – provided in Clause Eleven of its Declaration of Rights: "That in controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred."

Constitution by the Antifederalists. Prominent statesmen like George Mason of Virginia and Elbridge Gerry of Massachusetts left Philadelphia refusing to support the new charter, largely because it lacked a Bill of Rights and (in particular) a civil jury trial guarantee. *See generally* Charles Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973); 3 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1891).

It is noteworthy for purposes of the instant Petition that the gravest source of public discontent over the proposed Constitution – as it related to a right to jury trial – was that the original language *gave the Supreme Court appellate jurisdiction both as to law and fact*. *See* PROFFATT, *supra*, at 123; Edith Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 295 (1966). The combined result – in the eyes of many of this nation's Founders – was a danger that any meaningful right to a civil jury trial would be obliterated, allowing for (in essence) a "trial by appeal," with impartial jurors replaced by aloof judges. *Id.*

The eventual result was the 7th Amendment, introduced by James Madison and approved by the first Congress on September 25, 1789, 1 Stat. 97 (1789). This provision was designed to be broad enough to allow flexibility in the States, while at the same time guaranteeing that impartial juries – rather than detached appellate judges – would decide issues of fact and render decisions in civil cases.

B. Impartiality As An Integral Component Of The Modern American Scheme Of Justice.

Although the 7th Amendment does not mandate that states grant civil jury trials as a matter of right, in fact, all of the original thirteen colonies continued this practice. Today, all fifty states provide a right to trial by jury in civil cases; predominantly by constitutional mandate.[7]

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[7] The following state constitutional provisions expressly provide for the right to trial by jury in civil proceedings: ALASKA CONST. art. I, §16; ARK. CONST. art. II, §7, *amended by* ARK. CONST. amend. 16; CAL. CONST. art. I, §16; HAW. CONST. art. I, §13; IDAHO CONST. art. I, §7; IND. CONST. art. I, §20; ME. CONST. art. I, §20; MD. CONST. Dec. of R., §23; MASS. CONST. pt 1, art. 15; MINN. CONST. art. I, §4; MISS. CONST. art. III, §31; MO. CONST. art. I, §22(a); MONT. CONST. art. II, §26; NEB. CONST. art. I, §6; NEV. CONST. art. I, §3; N.H. CONST. pt 1, art. 20; N.M. CONST. art. II, §12; N.J. CONST. art. I, §9; N.Y. CONST. art. I, §2; N.C. CONST. art. I, §25; OHIO CONST. art. I, §5; OKLA. CONST. art. II, §19; OR. CONST. art. I, §17; PA. CONST. art. I, §6; R.I. CONST. art. I, §15; SC CONST. art. I, §14; S.D. CONST. art. VI, §6; VA. CONST. art. I, §11; WASH. CONST. art. I, §21; WIS. CONST. art. I, §5; WYO. CONST. art. I, §9.

The following state constitutional provisions provide for a general right to trial by jury and have been interpreted by the state courts to include jury trials for civil suits: ALA. CONST. art. I, §11; ARIZ. CONST. art. II, §23; CONN. CONST. art. I, §19; DEL. CONST. art. I, §4; FLA. CONST. art. I, §22; ILL. CONST. art. I, §13; IOWA CONST. art. I, §9; KAN. CONST. B. of R., §5; KY. CONST. B. of R., §7; MICH. CONST. art. I, §14; N.D. CONST. art. I, §13; TENN. CONST. art. I, §6; UTAH CONST. art. I, §10; VT. CONST. ch I, art. 12; W. VA. CONST. art. III, §13.

The following state constitutional provisions do not expressly provide for the right to trial by jury in civil cases but have been interpreted as doing so by the state courts: COLO.

(Continued on following page)

Most states have explicitly recognized that a right to trial by jury incorporates a notion of impartiality. Thus, as the Missouri Supreme Court has put it: "The right of trial by jury guaranteed by our Constitution, if it be worth anything, must mean, as this court has said, 'the right to a fair and impartial jury.' " *Tate v. Giunta*, 413 S.W.2d 200, 203 (Mo. 1967) (quoting *Lee v. Baltimore Hotel Co.*, 345 Mo. 458, 463, 136 S.W.2d 695, 698 (1939)).

Without providing an exhaustive list, it is sufficient to note that decisions of state courts linking a requirement of impartiality to the right of jury trial, once granted, are legion. *See, for example, Moran v. Jones*, 75 Ariz. 175, 253 P.2d 891, 895 (1953); *McCrotty v. Baltimore & O.S.W.R. Co.*, 229 Ill. App. 117, 121 (1923); *Marshall Durbin, Inc. v. TEW*, 381 So. 2d 152 (Miss. 1980); *Beatty v. Akron City Hospital*, 67 Ohio St. 2d 483, 424 N.E.2d 586 (1981); *Maahs v. Schultz*, 207 Wis. 624, 242 N.W. 195 (1932). State courts have expressly acknowledged that the requirement of impartiality flows not only from their own state constitutions, but also from the federal due process requirement of the 14th Amendment. *See, e.g., Texas Employers Ins. Ass'n v. Beattie*, 733 S.W.2d 700 (Tex. App. 1987).

This should come as no surprise, in a jurisprudential sense. Both federal and state courts have recognized the strong link between due process and an impartial jury,

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CONST. art. II, §23; *see Gibson v. Angros*, 30 Colo. App. 95, 491 P.2d 87, 91 (Colo. App. 1971); LA. CONST. art. I, §17. *See, e.g., Jobe v. Hodge*, 253 La. 483, 218 So. 2d 566 (1969) *overruled on other grounds*, 295 So. 2d 437 (La. 1974).

even though the 7th Amendment has remained "unincorporated" under the 14th Amendment. As the 4th Circuit recently observed in *Haley v. Blue Ridge Transfer Co., Inc.*, 802 F.2d 1532, 1535 (4th Cir. 1986):

> It is fundamental that every litigant who is entitled to trial by jury is entitled to an impartial jury, free to the furthest extent practicable from extraneous influences that may subvert the fact-finding process. Because an impartial jury is obviously a touchstone of a fair trial, courts throughout modern history have labored to safeguard sitting jurors from improper contacts and advances by third parties.

Thus, while a state may decline to create a system of civil jury trials, or abolish such a system entirely, it runs afoul of the 14th Amendment if a state creates such a system but does not ensure impartiality. This Court explained the proper function of the federal courts in such matters in *Fay v. People of State of New York*, 332 U.S. 261 (1947): "The function of this federal Court under the Fourteenth Amendment in reference to state juries is not to proscribe procedures *but is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ.*" *Id.* at 294 (emphasis added).

As one leading scholar on the Constitution has similarly explained: "While the state has discretion with regard to the detailed operation of its jury system, it is still bound by the fundamental requirement that the jury must be capable of acting as a fair tribunal in a given case." 3 BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 104 (1968). Moreover, "(Since) lack of jury impartiality is 'abhorrent to the democratic ideals of trial by jury,' the right to an impartial jury is treated . . . as one of the

fundamental rights guaranteed by the Fourteenth Amendment." *Id.* at 105 (quoting *Thiel v. Southern Pacific Co.*, 328 U.S. at 220).

As a result, one need not rekindle the *Palko-Adamson* dispute in order to conclude that a right to an impartial jury – if a jury system is in fact created by a particular state – is "implicit in the concept of ordered liberty." *See Palko*, 302 U.S. at 325 (Cardozo, J.). Raw principles of due process articulated time and time again by this Court, lower federal courts, and state courts make clear that a maintenance of impartiality in jury trials – federal and state alike – is "fundamental to the American scheme of justice." *See Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), *reh'g denied*, 392 U.S. 947 (1968).

A state may vary the size of the jury from twelve to a different number; it may establish an endless array of procedures different from those established in federal court under the 7th Amendment; it may abolish civil jury trials completely; but it may not strip the jury trial of its soul and obliterate its impartiality. A fair trial in an impartial tribunal is a "basic requirement of due process." *In Re Murchison*, 349 U.S. at 136; *Jordan v. Massachusetts*, 225 U.S. at 176.

II. Because The Jury Viewed A Highly Prejudicial News Account And Admitted That It Was Incapable Of Remaining Impartial, The Due Process Clause Of The 14th Amendment Requires That A New Trial Be Granted Or (At A Minimum) That The Trier Of Fact Be Given The Opportunity To Make A Determination As To Prejudice.

Obtaining information outside that properly admitted as evidence, from the earliest days, has been forbidden by the terms of the juror's oath. Where it appears

that such information has (or might have) influenced the verdict, the verdict must be set aside. PROFFATT, *supra*, at 453. The theory behind this component of due process is that evidence submitted at trial must be subject to cross-examination and rebuttal. The very purpose of adopting rules of evidence is to exclude from the jury's consideration those facts or information which may have a tendency to confuse or prejudice. If a juror has information relevant to the matter at issue, he or she must be sworn and subjected to examination as a witness, rather than providing extraneous information to fellow jurors unregulated by the court and the rules of evidence. *Id.* at 454.

Countless decisions in both state and federal courts have held that when jurors read and/or communicate about media accounts which contain information prejudicial to the defendant, a new trial is warranted in the criminal context. *See* Andrea Nadel, Annotation, *Juror's Reading of Newspaper Account of Trial In State Criminal Case During Its Progress As Ground For Mistrial, New Trial, Or Reversal*, 46 ALR 4th 11, 52-56 (1986 & Supp. 1991). The cases are equally clear that the timing of the jurors' exposure to media accounts is critical. Exposure to such prejudicial news accounts *during the course of deliberations* (as in the instant case) is particularly disconcerting and raises immediate due process concerns. *Id.* at 87-92.

Prejudice in many forms from media coverage has been identified, and corrected by this Court, in the name of due process. *See, e.g., Marshall v. United States*, 360 U.S. 310 (1959); *Mattox v. United States*, 146 U.S. 140 (1892). This Court in *Mattox* established the sound rule that extraneous information was "forbidden" to be provided

to jurors; unless determined to be harmless, such a misapplication of justice required a new trial. *Id.* at 150. In more recent times, *Remmer v. United States*, 347 U.S. 227 (1954), held that extraneous communications to jurors during trial were "presumptively prejudicial." *Id.* at 229. This doctrine has been applied in civil cases just as vigorously as it has been applied in criminal cases. *See Haley*, 802 F.2d at 1535. The "presumption of prejudice" has also been applied in state cases, like the instant one, which have raised federal Constitutional issues on appeal to the federal courts. *See Owen v. Duckworth* 727 F.2d 643 (7th Cir. 1984).

III. The Pennsylvania Supreme Court Violated The Due Process Clause Of The 14th Amendment When It By-Passed The Trial Court's Determination of Prejudice And Supplanted It With An *Ad Hoc* Determination Unsupported By The Factual Record, Resulting In A Civil Jury That Was Not Impartial.

It is not disputed in this Petition that states have a certain amount of latitude in establishing standards for determining prejudice. *See Williams v. Salamone*, 192 Conn. 116, 470 A.2d 694, 697 (1984) (and cases cited therein). However, such latitude necessarily must cease where its exercise collides with the federal guaranty of due process.

This Court has specifically held that the ultimate question of whether a juror was prejudiced is a question of fact. *See Rushen v. Spain*, 464 U.S. 114 (1983) (per curiam), *reh'g denied*, 465 U.S. 1055 (1984). Even if one surmounts the weighty "presumption of prejudice" mandated by the federal Constitution and leapfrogs directly to the Pennsylvania Supreme Court's three-part test for prejudice (as the majority of the Pennsylvania court did),

there is absolutely no question that the news account viewed and discussed by the jurors here was patently prejudicial.

The majority opinion in this case declared that the news broadcast was "an accurate straightforward account" and "cannot be characterized as inflammatory or emotional in nature." Such a factual declaration (from a court which did not even choose to view a tape of the television broadcast) is nothing short of stupefying. In a civil context, the prejudicial news account to which the jury was openly exposed in the instant case was as extreme as extreme gets. The trial judge, Zeleznik J., stated (in essence) that he "knew prejudice when he saw it." (App. at 83). Any jurist who viewed this videotape and presided over this trial, would likewise know prejudice when he or she saw it.

This action involved a 14-year-old boy who was electrocuted; who had a hand, a toe, and portions of a foot amputated. The news account viewed by two jurors and discussed openly by all jurors during the midst of deliberations involved another 16-year-old boy, killed by electrocution while climbing a similar electrical Tower on the same U.S. Steel property. The news footage was a nightmare incarnate for any trial lawyer, which the trial judge clearly understood. A factfinder is a factfinder not out of random occurrence, but as an integral part of the American system of justice. The trial judge in this case recognized certain key facts relating to prejudice which the majority of the Pennsylvania Supreme Court chose to ignore. He was thus rendered Constitutionally impotent, stripped of his ability to ensure an impartial jury and a fair trial. The facts of record which weighed heavily in

favor of the trial judge finding prejudice included the following:

1) Evidence concerning subsequent accidents at the site had been previously excluded by the trial court through a Motion in Limine. The news account in question permitted the jury to consider information concerning the Dudley fatality without the benefit of cross-examination or any exculpatory evidence being offered on the part of U.S. Steel.

2) The news footage showed a dead 16-year-old boy, with ambulances flashing red lights at the base of the Tower, creating a visually inflammatory background.

3) The jurors were not told any further details of the Dudley fatality. They were thus permitted to roam free in speculation as to countless forms of "negligence" potentially committed by U.S. Steel.

4) No barriers were visible on the Tower, in the footage of the Dudley accident. This permitted jurors to reach an improper inference that U.S. Steel had done nothing to ward off other child-trespassers after the Carter electrocution. In fact, *the trial judge was well aware that a metal barrier had been constructed by U.S. Steel across the steps of the Tower after the Carter accident, to prevent future accidents;* but this barrier had been cut down before Dudley scaled the Tower. Thus, any "exculpatory evidence" was not visible on the television broadcast.

5) The Pennsylvania Supreme Court – unlike the trial court – had not travelled down dirt roads in a bus into the Monongahela River valley, to view the Carrie Furnace site along with the jury. The trial judge vividly understood the subtle connections between the televised news account and the fabricated steel Tower which played the lead role in the Carter trial; he understood the

highly inflammatory nature of the WTAE broadcast as perceived by *this particular jury.*

6) Nothing in the record indicates that the Pennsylvania Supreme Court ever viewed the video-tape of the news account. The fractured majority of the Pennsylvania Supreme Court relied solely upon a written, partially-illegible tele-prompter transcript, which omitted certain key words uttered by the newscaster, and did nothing to convey the highly inflammatory nature of the visual presentation.

7) The news footage allowed the jury to improperly speculate that Christian Stonebreaker – the friend of Carter whom they observed testify in the courtroom – was the boy killed in the subsequent accident; a conclusion obviously reached by juror #1.

8) The jury was incapable of knowing that the Dudley case would later be dismissed on a summary judgment motion, exonerating U.S. Steel. The only information received by the jury was that U.S. Steel had been "negligent" and caused both electrocutions through its disregard for the safety of children.

9) Jurors acknowledged at the conclusion of the trial that they had placed great emphasis on the fact that "USX Corp. has not tried to prevent similar accidents." (App. at 102). This theory was not supported by any evidence of record; rather it was fueled solely by the inflammatory WTAE newscast.

This case presents the Court with an opportunity to address a critical issue dealing with civil jury trials in the United States, at a pivotal area of interplay between state and federal courts in an increasingly-active era of State Rights. Although the 7th Amendment does not apply to the several states through the 14th Amendment, at some

point the federal due process clause intersects with the voluntary creation of civil jury systems and mandates that states maintain impartiality in their jury trials. State supreme courts must understand that if they cross this threshold of intersection and violate it, the United States Supreme Court maintains the power to review and reverse.

It is unfair to place jurors in the position they found themselves in this case – having to confess their obvious discomfort at having placed so much emphasis on a news broadcast not in evidence, and then having the appellate court second-guess the jurors' own words, under a theory that the jurors must do (or say) something more if they wish to admit their own failure to act according to the judge's charge. Due process requires a far less mangled standard. Even if one eliminates all discussions of the jury's *deliberative* process – which the trial judge properly excluded in reaching his decision – the transcript contains unequivocal language of three jurors who responded unabashedly "no," when asked by the court if they had been able to base their verdict strictly upon the evidence admitted in the courtroom. Requiring jurors to rack their consciences and perform further *mea culpas* – in order to articulate more explicitly that they have failed to remain impartial – is both unrealistic and dangerous. Determining "impartiality" at this point is precisely the function of the trial judge who, as the single person most intimately familiar with the trial, the mood, the circumstances and the evidence, must exercise his or her sound discretion and reach a factual determination as to whether prejudice has irreversibly tainted the jury.

In the instant case, due process was denied U.S. Steel through a two-step perversion of the state system. First,

the splintered majority of the Pennsylvania Supreme Court bypassed and usurped the fact-finding function of the trial judge. If the Pennsylvania Supreme Court intended to enunciate a new three part test governing prejudice, that was certainly within its prerogative. However, it was required to do so within the parameters of its own system of justice. The process which was "due" U.S. Steel was that the trial judge – Zeleznik, J. – would apply the three-part test based upon the facts of record and his first-hand exposure to the case. He would then issue an opinion, articulate his reasoning, and this opinion would be subject to the ordinary channels of appellate review. As it stands, the majority of the Pennsylvania Court instead manufactured its own facts – avoiding the clear pronouncements of the trial judge which (it is no secret) would have led to a finding of "prejudice" even under the new three-part standard – and thus skirted the requirements of due process through an appellate slight-of-hand.[8]

The second step by which due process was subverted is more significant. Standing alone, the usurpation of the fact-finding role by over-reaching appellate judges may be a harmless abuse of the system. However, in this case, such usurpation led to the denial of an impartial jury, the most-fundamental process which is "due" any defendant in a civil jury trial. Distilled to its starkest terms, there simply is no basis in the record for the Pennsylvania Supreme Court's factual pronouncement. Such is the inevitable hazard of appellate fact-finding.

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[8] U.S. Steel still does not know which (if any) of the three prongs of the new Supreme Court test the finder-of-fact would have found unsatisfied in this case. According to the original opinion of Judge Zeleznek, one would conclude that the answer would still be "none."

"Horse-trading" votes may be reality in state appellate courts. But this practice must not be countenanced where federal constitutional rights are at stake. Corporations, no less than the single most deserving citizen, are entitled to impartiality in jury trials which hold them liable for millions of dollars in damages, particularly in the bleak economic world now facing numerous corporations like U.S. Steel.

The very eventuality which citizens and statesmen feared most in 18th-century America – at the time the U.S. Constitution was ratified – was that aloof, detached appellate judges would usurp the fact-finding functions of trial judges and juries, and thus strip them of the right to meaningful, impartial jury trials in the civil realm; where their property, their livelihoods, their futures were at stake. This is precisely what the Pennsylvania Supreme Court has done in the instant matter, under the guise of announcing a new test pursuant to state law.

CONCLUSION

For the above reasons, certiorari should be granted. As this Court wrote in *In Re Murchison*, "a fair trial in a fair tribunal is a basic requirement of due process." One does not have to reopen the *Palko-Adamson* dispute in order to make explicit this basic tenet, even in the previously untested venue of state courts.

Respectfully submitted,

C. Richter Taylor, Jr.
Ken Gormley
Joy Gobos McNally

Counsel for Petitioner,
U.S. Steel Corporation

APPENDIX

APPENDIX

A. PA Supreme Court Opinion.....App. 1

B. PA Superior Court Opinion.....App. 25

C. Court of Common Pleas Opinion.....App. 73

D. Letter Denying Rehearing.....App. 88

E. Application for Reargument.....App. 89

F. Excerpted Portions – Motion for Post-Trial Relief.....App. 100

G. Motion for Mistrial.....App. 103

H. Motion in Limine.....App. 107

I. Order of Court (Motion in Limine).....App. 110

J. Transcript of Proceedings (Juror Interviews).....App. 112

K. Constitutional Provisions.....App. 143

L. Pittsburgh Post-Gazette News Article.....App. 144

M. WTAE Television Broadcast (Teleprompter Transcript).....App. 146

APPENDIX A

[J-157-1991]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

ANDREW CARTER, a minor, by his parent and natural guardian, DONALD CARTER and DONALD CARTER, IN HIS OWN RIGHT,	:	No. 46 W.D. Appeal Docket 1990
Appellants	:	Appeal from the Order of the Superior Court entered on January 4, 1990, at No. 1652 Pittsburgh 1987, affirming the Order of the Court of Common Pleas of Allegheny County entered on November 2, 1987 at No. G.D. 84-16716, Civil Division
v.	:	390 Pa.Super. 265, 568 A.2d 646 (1990).
UNITED STATES STEEL CORPORATION,	:	ARGUED:
Appellee	:	SEPTEMBER 26, 1991

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

JUSTICE ROLF LARSEN FILED: MARCH 6, 1992

On June 1, 1984, fourteen-year-old Andrew Carter (appellant) and a friend climbed an electrical transmission tower at USX's Carrie Furnace Works in the borough of Swissvale, Allegheny County. While climbing the tower, Carter grabbed onto an uninsulated high voltage wire, and received a charge of electricity. His injuries

resulted in amputation of his left forearm and one of his toes. An action was brought against USX pursuant to Section 339 of the Restatement (Second) of Torts, "Artificial Conditions Highly Dangerous to Trespassing Children." The jury returned a verdict in favor of appellants in the amount of $1,500,000, later molded to $1,200,000 to reflect the jury's apportionment of twenty percent of the negligence to Carter. The trial court subsequently granted USX a new trial after concluding that a television broadcast, viewed by certain jurors and discussed by the jury during deliberations, was prejudicial. On appeal, a Superior Court panel reversed the grant of a new trial. The case was subsequently reargued before Superior Court sitting en banc. A divided court affirmed the order granting a new trial. The issue before us, upon a grant of allocator, is whether the broadcast was a proper basis for impeaching the jury's verdict.

The jury began its deliberations on the afternoon of February 12, 1986. Not having reached a verdict that day, the jury was dismissed for the evening. During its 6:00 p.m. news program on February 12th, WTAE, a local television station, broadcast the following story (hereinafter, "the broadcast"):

> The parents of an electrocuted sixteen-year-old are suing USX Corporation. Orlando Dudley died October 4th [1986] when he touched a live wire in the Carrie Furnace Mill. The North Braddock boy was searching for copper wire. His parents claim USX was negligent because it did not warn of electrical dangers. They say the company should have posted danger signs after another boy lost a hand and part of his foot in a similar 1984 electrocution there. A lawsuit on

> that incident is being heard now in Allegheny County Court.

(Trial Court Opinion at 8).

This broadcast substantially summarized the contents of an article which had appeared on the morning of February 12, 1987 in the eastern suburban edition of The Pittsburgh Post Gazette newspaper. The article was entitled, "Parents sue USX over boy's mill death." (hereinafter, "the article"). The final sentence of the article quoted the manager of public affairs for USX as stating that (other than the accidents involving the appellant herein and Orlando Dudley) "no other cases involving similar accidents at the Carrie Furnace mill have been filed."[1] (The full article is attached as an Appendix hereto).

On the morning of February 13, 1987 counsel for USX informed the trial court of the article and the broadcast. After the jury had resumed deliberations, the trial judge met with counsel in chambers. Counsel for USX asserted that the article was so prejudicial that the jury should be polled immediately in order to determine whether they

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[1] The reporter who wrote the article testified during a deposition held in the latter part of 1987 as follows:

> A. I telephoned Mr. Shortridge (manager of public affairs for USX) on February 11 the day before this article was published and spoke with him regarding the article and its content, and that was the essence of our conversation.
>
> Q. Did you in that conversation mention both the Dudley and the Carter accidents?
>
> A. Yes.

had read the article or were aware of it. After discussing the matter with counsel, the trial judge decided not to interrupt the jury's deliberations but to "let the matter roll." (N.T. 2/13/87, at 11). Before leaving chambers, counsel for USX stated, "I think that for the purposes of protection of my client, I should put on the record informally here in chambers a motion for a mistrial because I think this article is so prejudicial that . . . I would be remiss if I did not do so." (*Id.*, at 12). Contrary to the trial court opinion, the record reveals that the trial court neither granted nor denied the oral motion for a mistrial at the time.[2] The final exchange between the trial judge and counsel for USX was as follows:

> THE COURT: Maybe no one read it [the article] at all. Maybe you will get a defense verdict, then it becomes moot.
>
> [COUNSEL FOR USX]: In that event, I will withdraw my motion.

(N.T. 2/13/87 at 15).

Shortly after the in-chambers conference ended, the jury returned its verdict on special interrogatories.

Before he dismissed the jury, the trial judge called each juror, individually, into his chambers and inquired

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[2] During the in-chambers conference of February 13, 1987, counsel for USX stated, "We ought to prepare a motion with these articles, various articles attached just for the purposes of the record, file it with the court." The trial judge responded, "You can file supplemental ones as you find out." (N.T. 2/13/87 at 14). Ten days after the verdict, USX filed such a motion. There is no indication in the record that the motion was ever granted or denied.

about the article and the broadcast. The inquiries revealed that none of the jurors had read the article but that two of the jurors had seen the broadcast and that it had been discussed during deliberations. There was also testimony regarding the effect of the broadcast, a matter which is discussed infra.

The subject of post-verdict testimony by jurors has been extensively discussed in other opinions of this Court and does not require prolonged discussion here. Briefly stated, the need to ensure fair trials, free from improper influences must be balanced with the need for finality and for protecting the sanctity of the jury room. The rule in Pennsylvania, as well as in a majority of jurisdictions, is that a juror is incompetent to testify as to what occurred during deliberations. *Pittsburgh National Bank v. Mutual Life Insurance Company,* 493 Pa. 96, 425 A.2d 383 (1981). This rule is often referred to as the "no impeachment" rule. However, in order to accommodate the competing policies in this area, a narrow exception has been recognized. The exception permits "post trial testimony of extraneous influences which might have affected [prejudiced] the jury during deliberations." (*Id.* at 493 Pa. 101). Under this exception, the juror may testify only as to the existence of the outside influence, but not as to the effect this outside influence may have had on deliberations. *Pittsburgh National Bank, citing Commonwealth v. Zlatovich,* 440 Pa. 388, 269 A.2d 469 (1970). Under no circumstances may jurors testify regarding their subjective reasoning processes.

In the instant case, the trial judge disregarded the rule prohibiting testimony by jurors on the effect an extraneous influence may have had on their verdict. The

transcript of the post-verdict polling of the jury contains precisely the type of inquiries which the law clearly prohibits. For example, the trial court stated to one juror, "You should say anything that comes to your mind." (N.T., 2/13/87 at 31). The same juror was asked by the trial court, "So, then, that did have some effect on your deliberation and your verdict?" *Id.* Another juror was asked by the trial court, "What persuaded you to change your mind?" (*Id.*, at 35).[3]

The purpose for excluding testimony as to the effect of the extraneous influence was stated by us in *Zlatovich, supra*:

> In the course of a jury's deliberations each juror weighs countless factors many of which he may not consciously be aware he is even considering. This is a rubric of life. Whenever a choice must be made, few men come to a decision on the basis of one factor alone, but only after weighing all the conflicting variables which inhere in the choice. Being personal to each juror, the working of the mind of any of them cannot be subjected to the test of other testimony, and therefore . . . such testimony should not be received to overthrow the verdict to which all assented.[4]

Id., at 440 Pa. 396.

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[3] Two jurors testified that they had seen the broadcast; one stated that the broadcast had no effect at all while the other stated that the broadcast did affect her deliberations. Two other jurors testified that their deliberations on the verdict were influenced by discussion of the broadcast.

[4] When the instant verdict was announced in open court, there was no dissent from any juror. Just before the verdict was

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It is clear, then, that testimony as to the effect of the broadcast on jury deliberations was improperly received and is of no legal consequence since the jurors were utterly incompetent to testify on such a subject. That the testimony has "no legal significance" is conceded by USX. (Brief for Appellee at 19).

Although testimony as to the subjective reasoning processes of the jurors is inadmissible, there remains a question as to the admissibility of testimony that the broadcast was seen by two of the jurors and communicated to other jurors during deliberations. Appellants argue that our previous cases concerning the admissibility of post-verdict testimony provide no basis for admitting testimony that the jury was exposed to the instant broadcast. Appellants argue that post-verdict testimony is only admissible when the misconduct of a third party causes prejudicial information to reach the jury. The misconduct of jurors, themselves, is, in appellants' view, inadmissible. Appellants cite the following cases as support for their position: *Pittsburgh National Bank,* supra; *Friedman v. Ralph Brothers, Inc.*, 314 Pa. 247, 171 A. 900 (1934); *Commonwealth v. Zlatovich,* supra; and *Commonwealth v. Sero,* 478 Pa. 440, 387 A.2d 63 (1978). These cases merit consideration in light of appellants' reliance upon them.

In *Friedman,* it was alleged that the jury foreman made an unauthorized visit to the accident scene, took

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read, the court clerk asked, "Members of the jury, have you agreed upon your answers to the interrogatories?" The jury responded, "We have." (N.T. 2/13/87 at 15).

measurements and told his fellow jurors about his findings. Upon inquiry by the trial judge, some of these allegations were denied by the foreman, and inconsistent statements were made by the other jurors as to their recollection of what the foreman related. This Court, invoking the no-impeachment rule, held that post-verdict testimony of what transpired in the jury room was inadmissible. We then stated, "Only in clear cases of *improper conduct by jurors*, evidenced by competent testimony, should a verdict which is fully supported by the evidence be set aside and a new trial granted." (emphasis added). *Id.*, at 314 Pa. 249. Significant to the holding in *Friedman* was our finding that the information complained of could not have prejudiced the jury because the information communicated by the foreman to the other jurors was information already in evidence. Similarly, In *Pittsburgh National Bank, supra,* a juror visited a car dealership and inspected a vehicle similar to the one involved in the case. This Court resolved the issue of admissibility of post-verdict testimony by finding *Friedman* controlling and, without further discussion, held that testimony of the alleged juror misconduct was inadmissible.

In *Zlatovich, supra,* a discharged juror was quoted in a newspaper article as saying that the jury was afraid to return a verdict of not guilty by reason of insanity for fear that the defendant might be released after a year or so. This Court held post-verdict testimony as to the juror's statement inadmissible since such testimony clearly concerned the mental processes by which the jury arrived at the verdict. In the course of resolving the issue of admissibility of post-verdict testimony, we referred in *Zlatovich* to an earlier case involving the same issue, *Welshire v.*

Bruaw, 331 Pa. 392, 200 A. 67 (1938). In *Welshire,* we affirmed the trial court's decision to admit post-verdict testimony of the coercive conduct of the tipstaff in charge of the jury during its deliberations. Our decision in *Zlatovich,* in further distinguishing the admissible testimony in *Welshire,* points out that *Welshire* involved the improper conduct of a *third party* (emphasis in the original). *Zlatovich* did not hold, however, that only improper conduct of third parties is a proper basis for admitting post-verdict testimony. In fact, testimony of allegedly prejudicial *juror misconduct* was found to be admissible in *Sero, supra.* There, post-verdict testimony consisted of a statement by one juror that another juror's husband had communicated information concerning the defendant's interest in Bible study after being charged with wife's murder. This Court held that testimony of the alleged juror misconduct was admissible but again appeared to tie the admissibility of such misconduct to the concept of third party misconduct when we stated, "information, if prejudicial, that reaches a juror through a third party is precisely the evil our our [sic] exception to the no impeachment rule is intended to obviate." *Id.,* at 478 Pa. 448. Although testimony of the alleged juror misconduct was admissible, the conduct was not sufficient to warrant the grant of a new trial since the information did not "create the potential for prejudice that we have said can emasculate a jury's impartiality and indifference, thus mandating a new trial." *Id.*

That appellants would view these cases as standing for the principle that only improper conduct by third parties may be the subject of post-verdict testimony is not inconceivable. However, no such holding emerges from

these cases despite the emphasis given the concept of improper third party influence. Rather, what emerges is the need to analyze the facts and circumstances of each case with the goal of protecting the sanctity of the jury's verdict and at the same time preventing injustice. This principle is succinctly stated in *Sero, supra*: "We can maintain the viability of the jury as a judicial decisionmaking body only by guaranteeing that a verdict is reached by evidence and argument in open court, not by outside influences that might strip the jury of the impartiality we demand." Although *Sero* is a criminal case, we believe the commitment to fairness should be the same in criminal and civil trials. "It is fundamental that every litigant who is entitled to a jury trial is entitled to an impartial jury, free to the furthest extent practicable from extraneous influences that may subvert the factfinding process." *Haley v. Blue Ridge Transfer Co., Inc.*, 802 F.2d 1532 (4th Cir. 1986).

Testimony that jurors were exposed to the instant broadcast and discussed it during deliberations is not testimony of the jury's reasoning processes; rather it is testimony of overt conduct. When such overt conduct is related to an issue in the case, as it was here, the potential for prejudice may arise.[5] In light of the foregoing principles, we do not agree with appellants that post-verdict

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[5] We recognize that not every instance of publicity bearing on the subject of the trial has the potential to prejudice the verdict. There may be instances in which the nexus between the publicity in question and an issue in the trial is so attenuated as to render the publicity innocuous.

testimony as to the existence of the broadcast was inadmissible. We find support for this position in other jurisdictions which have admitted post-verdict testimony that jurors read newspaper accounts of the trial during deliberations. See, e.g., *Willis v. Louisiana Power & Light Co.*, 524 So.2d 42 (La.App. 1988); *Siegal v. Mt. Sinai Hospital of Cleveland*, 62 Ohio App.2d 12, 403 N.E.2d 202 (1978); *City & County of San Francisco v. Bricklayers Union Local & U.A. Local 38*, 217 Cal.Rptr. 167, 185 Cal.App.3d 229 (1985), *rev'd on other grounds*, 726 P.2d 538 (1986). Similarly, testimony that jurors viewed a television broadcast which discussed the subject matter of the trial in which they were engaged has also been held admissible. *Elsworth v. Beech Aircraft Corp.*, 37 Cal.3d 540, 691 P.2d 630 (1984), *cert. denied*, 471 U.S. 1110 (1985).

Once the existence of a potentially prejudicial extraneous influence has been established by competent testimony, the trial judge must assess the prejudicial effect of such influence. Because a trial judge is precluded from considering evidence concerning the subjective impact of an extraneous influence on any juror, it has been widely recognized that the test for determining the prejudicial effect of an extraneous influence is an objective one. In order to determine whether an extraneous influence is prejudicial, a trial judge must determine how an objective, typical juror would be affected by such an influence. See *After Hour Welding Inc., v. Laneil Management Co.*, 108 Wis.2d 734, 324 N.W.2d 686 (1982); *Urseth v. City of Dayton* 680 F.Supp. 1084 (S.D. Ohio 1987); *Owen v. Duckworth*, 727 F.2d 643 (7th Cir. 1984); see also 3 Weinstein & Berger, Weinstein's Evidence § 606(b) (1985 & May cum. supp.). In addition, cases from other jurisdictions which have

considered the prejudicial effect of an extraneous influence, make clear that prejudice is to be determined in light of the facts and circumstances in each case. "Where . . . the precise extraneous matter is known but direct evidence as to its effect on the deliberations is not permitted, a sound balance is struck by a rule which looks to the probability of prejudice from the face of the extraneous matter in relation to the circumstances of the particular case." *Fitzpatrick v. Allen*, 410 Mass. 791, 575 N.E.2d 750, 754 n.1 (1991); see also *Hanford Sands Inc., v. Groft*, 320 Md. 136, 577 A.2d 7 (1990).

Before turning to the facts and circumstances of the instant case to determine whether the broadcast in question was prejudicial, it is necessary to establish the proper standard of prejudice to be applied. Although the extraneous influence in the case at hand consists of publicity, we deem it appropriate to apply the same standard to all cases in which the existence of an extraneous influence has been shown by competent evidence.

We begin our consideration of the proper standard of prejudice by examining the analogous situation involving an ex parte communication between a judge and jury, a situation which, like an extraneous influence, implicates the impartiality and integrity of the jury. In *Commonwealth v. Bradley*, 501 Pa.25, 459 A.2d 733 (1983), this Court adopted a rule to be applied in both civil and criminal cases where a party seeks to have the verdict set aside on the basis of an ex parte communication between a judge and jury. A new trial will be granted in such cases only where there is a reasonable likelihood of prejudice. *Id.*, at 501 Pa. 36. Given the similar concerns inherent in ex parte

communications and extraneous influences, such a standard is appropriate whenever the existence of an extraneous influence has been established by competent evidence, and we now adopt this standard for all such cases, with the understanding that the burden of proof is upon the moving party.[6] In determining the reasonable likelihood of prejudice, the trial judge should consider 1) whether the extraneous influence relates to a central issue in the case or merely involves a collateral issue; 2) whether the extraneous influence provided the jury with information they did not have before them at trial; and 3) whether the extraneous influence was emotional or inflammatory in nature.[7]

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[6] The standard of prejudice to be applied where the existence of an extraneous influence has been established varies throughout other jurisdictions. See *Kirby v. Rosell*, 133 Ariz. 42, 648 P.2d 1048 (1982) (reasonable possibility of prejudice); *Ravin v. Gambrell*, 788 P.2d 817 (Colo. App. 1990) (reasonable possibility of prejudice); *Meirick v. Weinmeisterer*, 461 N.W. 2d 348 (Iowa Ct. App. 1990) (reasonable probability); 698 S.W.2d 795 (reasonable possibility); *Maryland Deposit Ins. Fund Corp. v. Billman*, 321 Md. 3, 580 A.2d 1044 (1990) (probability of prejudice). The foregoing jurisdictions place the burden for demonstrating prejudice on the moving party. Other jurisdictions, however, require the prevailing party to prove that the extraneous influence did not prejudice the verdict. See *Baptist Home of Miami Inc., v. Maler*, 579 So.2d 97 (1991) (prevailing party must demonstrate no reasonable possibility of prejudice); *Fitzpatrick v. Allen*, 410 Mass. 791, 575 N.E.2d 750 (1991) (prevailing party must show no reasonable likelihood of prejudice); *Haight v. Aldridge Elec. Co., Inc.*, 215 Ill.App.3d 353, 575 N.E.2d 243 (1991) (prevailing party must show no prejudice).

[7] Contrary to the view expressed in the Dissenting Opinion in this case, the three considerations listed here are not

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Turning to the facts of the instant case, on the morning of the in-chambers conference with the trial judge and opposing counsel, USX provided a copy of the article from the Pittsburgh Post Gazette and claimed that it was prejudicial. The claim did not specify the basis for the alleged prejudice or indicate the manner in which it was prejudicial.[8] We have previously held that prejudice in the abstract is not prejudice. *August v. Stasak*, 492 Pa. 550, 424 A.2d 1328 (1981).

Moreover, the instant broadcast can fairly be characterized as an accurate, straightforward account of the fact that a second lawsuit had been filed against USX over a similar accident at its Carrie Works; the broadcast cannot be characterized as inflammatory or emotional in nature. USX argues that the prejudicial nature of the broadcast is

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intended as a "three-part-test" or a "rule." The considerations are intended as guidance for trial courts in determining whether, under the facts and circumstances of the case, extraneous information is reasonably likely to have prejudiced the jury.

[8] During the in-chambers conference of February 13, 1987, counsel for USX made only the following-statements pertaining to prejudice:

> "[T]he article is so prejudicial to us that we have to find out whether any member of the jury was aware of it and read it."
>
> "I should put on the record informally here in chambers a motion for a mistrial because I think this article is so prejudicial that . . . I would be remiss I did not do so."

(N.T. 2/13/87, at 5, 12).

reflected in the fact that the trial court granted their motion in limine excluding evidence of injuries on USX property and/or USX electrical towers subsequent to the accident involving appellant. The trial court's ruling on the motion in limine is not before us on appeal and we make no determination as to the merits of that ruling; however, the trial court's decision that evidence of subsequent injuries should be excluded from trial is not determinative of whether, under the facts and circumstances of the case, there is a reasonable likelihood that the jury was prejudiced by exposure to the instant broadcast. Explaining its finding that the broadcast was prejudicial, the trial court stated in pertinent part:

> The content of the newscast, that a teenage boy of 16 entered the same plant, climbed a similar electrical tower and was fatally electrocuted by a similar uninsulated wire while standing upon a similar platform commencing to salvage copper wire with a hacksaw, and thereafter citing the lack of safety precautions by the defendant even after a similar accident had occurred (the instant Carter case) raises an immediate adverse inference as to defendant's contempt for the lives of trespassing children.

(Trial Court Opinion at 13).

Information that USX had not taken precautions or made any alterations after the Carter accident was not new information to the jurors in this case. The lack of such precautions was readily apparent to the jurors when they viewed the site of the accident during trial.

In addition to the above considerations, the trial court instructed the jurors, just prior to their deliberating, as follows:

> I want you to keep in mind that the dispute between these parties is for both of them a most serious matter. They rely on you and the court relies on you to give full and conscientious deliberation and consideration of the evidence and the issues . . . You must not allow sympathy or prejudice to influence your deliberations. That would not be just. I stated in the beginning, give these people a fair trial, both the plaintiff and the defendant. *You should not be influenced by anything other than the evidence and the law of the case.* (emphasis added).

(*Id.*, at 712).

The trial court also instructed the jurors before they began deliberating that their duty was to "reach a fair conclusion from the evidence and applicable law." (N.T., 2/12/87).

In light of the foregoing, we find that there was no reasonable likelihood of prejudice arising from the instant broadcast.

The following factors are also relevant in determining whether USX should have been awarded a new trial. On February 11, 1987, while the case was still being tried, USX consented to a telephone interview with a reporter who was writing the article which appeared in the Pittsburgh Post Gazette on February 12, 1987. We do not doubt that counsel for USX were "surprised and chagrined " (Brief for Appellee, at 8) by the appearance of the article, but we cannot impute that same surprise to

their client. Having participated in the process of generating the publicity about the second accident at the Carrie Works, USX is now estopped from legitimately complaining that they have been prejudiced by the jury's awareness of that publicity.

In addition, when the February 12th article and the broadcast were brought to the attention of the trial judge, USX chose to request immediate polling of the jury to determine whether any jury members were aware of the publicity. When the trial judge refused to conduct an immediate polling of the jury, deciding instead to "let the matter roll," counsel for USX, seemingly acquiescing, made no objection nor did he request any alternative such as having the trial judge issue cautionary instructions to the jury. A party may not remain silent and take his chances on a verdict then complain if it is adverse. *Zeman v. Canonsburg Borough*, 423 Pa. 450, 223 A.2d 728 (1966). Finally, when the trial judge advised counsel for USX that the publicity issue could become moot if USX got a favorable verdict, the response by counsel for USX constituted assent to the trial judge's decision to take a wait and see attitude toward the verdict. Again, USX is estopped from legitimately complaining.

The order of Superior Court affirming the denial of the motion for a judgment non obstante veredicto is affirmed. The Superior Court order affirming the grant of a new trial is reversed.

Messers Justice Zappala and Cappy concur in the result. Mr. Justice Flaherty files a dissenting opinion in which Mr. Chief Justice Nix and Mr. Justice McDermott join.

APPENDIX

PITTSBURGH POST GAZETTE ARTICLE OF FEBRUARY 12, 1987

"Parents sue USX over boy's mill death"

The parents of a 16-year-old North Braddock boy who died after being electrocuted at a steel mill are suing USX Corp. in a case similar to one being heard this week in Allegheny County Common Pleas Court.

Dorothy and Alfonso Dudley Of 825 Jones Ave., North Braddock, claim in the suit that USX was negligent because it failed to warn Orlando Dudley of electrical dangers at its Carrie Furnace mill, which straddles the communities of Swissvale and Rankin.

The boy was electrocuted last year. The lawsuit was filed last month.

In the case being heard this week, Donald and Andrew Carter, 1227 LaClair Ave., Swissvale, are claiming negligence by USX led to the electrocution of Andrew Carter at the same mill in 1984 when he was 15.

According to the Dudley complaint, Orlando Dudley and Henry Ramsey Jr. of Swissvale entered the mill on October 4 in search of copper wire.

After climbing 145 feet to a catwalk near the top of the tower, Dudley touched a hacksaw to the wire, screamed and eventually fell back onto the catwalk, Ramsey said.

Neil R. Rosen, attorney for the Dudleys, said USX was negligent in not posting danger signs at the plant. In the complaint, the Dudleys charge that USX knew the wires were dangerous because of the Carter electrocution at the mill in 1984.

The Carter case is being heard by a jury in the courtroom of Allegheny County Court of Common Pleas Judge Richard Zeleznik.

Their suit says that on the evening of June 1, 1984, Andrew Carter entered the plant with his friend Christian Stonebreaker.

The two boys climbed the top of a tower. Carter lost his footing, grabbed an electrical wire and was electrocuted. His left hand was later amputated as was part of his left foot.

The Carters allege that USX failed to restrict access to the mill and also was negligent by failing to warn the public of electrical hazards existing there.

The Dudleys hope to recoup costs of their son's burial and wages he would have earned as an adult.

John Shortbridge, manager of public affairs for USX, said that no other cases involving similar incidents at the Carrie Furnace mill have been filed.

[J-157-1991]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

ANDREW CARTER, a minor, by his parent and natural guardian, DONALD CARTER and DONALD CARTER, IN HIS OWN RIGHT Appellants v. UNITED STATES STEEL CORPORATION Appellee	No. 46 W.D. Appeal Docket 1990 Appeal from the Order of Superior Court entered on January 4, 1990, at No. 01652 Pittsburgh 1987, affirming the Order of the Court of Common Pleas of Allegheny County entered on November 2, 1987 at No. G.D. 84-16716, Civil Division. 390 Pa.Super. 265, 568 A.2d 646 (1990). ARGUED: September 26, 1991

DISSENTING OPINION

MR. JUSTICE FLAHERTY FILED: MARCH 6, 1992

I dissent. Not only has the majority stated an unnecessarily restrictive rule to determine when extraneous communication to a jury requires a new trial, but even applying the majority's rule to the facts of this case, a new trial is required.

The three part test set out by the majority to determine whether or not there was prejudice in the extraneous influence, here the broadcast, is as follows:

> 1) whether the extraneous influence relates to a central issue in the case or merely involves a collateral issue; 2) whether the extraneous influence provided the jury with information they did not have before them at trial; and 3) whether the extraneous influence was emotional or inflammatory in nature.

Slip Op. at 13. This rule is purportedly derived from *Commonwealth v. Bradley*, 501 Pa. 25, 459 A.2d 733 (1983), where this court held that a new trial will be granted because of an ex parte communication between a judge and jury only where there is a reasonable likelihood of prejudice. I see no need to further delineate the holding of *Bradley*, as the majority does by way of its three-part rule, for prejudice will be apparent on the facts of each case. And in any event, the majority's third requirement, emotional or inflammatory material, is irrelevant to this analysis. If extraneous material going to a central issue in the case is put before a jury, and that material is not otherwise available, the material need not be inflammatory in order for it to be prejudicial. A jury's deliberations are to be based on evidence produced in court, not on information received from extraneous sources.

But even if one were to agree with the majority's three-part rule, I cannot agree with the majority's application of the facts in this case to its rule. Two members of the jury saw and discussed with other members of the jury a television broadcast concerning the lawsuit which they were hearing. The broadcast stated:

> The parents of an electrocuted sixteen-year-old are suing USX Corporation. Orlando Dudley died October 4th [1986] when he touched a live

> wire in the Carrie Furnace Mill. The North Braddock boy was searching for copper wire. His parents claim USX was negligent because it did not warn of electrical dangers. They say the company should have posted danger signs after another boy lost a hand and part of his foot in a similar 1984 electrocution there. A lawsuit on that incident is being heard now in Allegheny County Court.

This news broadcast which the jurors heard and discussed concerned precisely what they were not permitted to hear at trial, for the trial court had granted a motion in limine excluding evidence of injuries on USX property subsequent to the accident involving Carter.

The extraneous material heard by some of the jurors and discussed by all of them is plainly inflammatory, for it involves an even worse injury to a child occurring on the corporation's property in similar circumstances, and it invites the invalid logic that any doubt as to the defendant's negligence is removed when, after the accident in this case, another similar accident occurred which the company did nothing to prevent. In fact, the inflammatory nature of this information is precisely why the trial court, correctly, excluded it from evidence.

I would expand the rule of *Bradley* (dealing only with ex-parte communications between the court and juries), and hold simply that a new trial is required if a jury has received extraneous information that is reasonably likely to prejudice a party. Beyond that, I would affirm Superior Court's grant of a new trial.

Finally, I do not believe that the attorney for USX seemingly acquiesced, as the majority puts it, to the trial

court's refusal to poll the jury. The court refused counsel's request to poll the jury and stated that the request may be moot after the verdict was returned. I understand this ruling to be that the matter of polling the jury would be adjudicated, if at all, after the verdict was returned.

Mr. Chief Justice Nix and Mr. Justice McDermott join this dissenting opinion.

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

ANDREW CARTER, a minor, by his Parent and Natural Guardian, DONALD CARTER and DONALD CARTER, in his own right,	No. 46 W.D. Appeal Docket 1990
Appellants	Appeal from the Order of Superior Court entered on January 4, 1990, at No. 01652 Pgh 1987, affirming the Order of the Court of Common Pleas of Allegheny County entered on November 2, 1987 at No. G.D. 84-16716
v.	
UNITED STATES STEEL CORPORATION,	
Appellee	390 Pa.Super. 265, 568 A.2d 646 (1990)
	ARGUED: September 26, 1991

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the **SUPERIOR COURT OF PENNSYLVANIA** affirming the denial of the motion for a judgment non obstante veredicto is affirmed. The Superior Court order affirming the grant of a new trial is reversed.

/s/ Irma T. Gardner
Irma T. Gardner
Deputy Prothonotary

DATED: March 6, 1992

APPENDIX B

ANDREW CARTER, A MINOR, BY HIS PARENT AND NATURAL GUARDIAN, DONALD CARTER, and DONALD CARTER, IN HIS OWN RIGHT	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	:	
v.	:	
UNITED STATES STEEL CORPORATION,	:	No. 01688 Pittsburgh 1987

Appeal from the Order Entered November 2, 1987 in the Court of Common Pleas of Allegheny County, Civil No. G.D. 84-16716, Issue No. 126661.

ANDREW CARTER, A MINOR BY HIS PARENT AND NATURAL GUARDIAN, DONALD CARTER, and DONALD CARTER, IN HIS OWN RIGHT	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
UNITED STATES STEEL CORPORATION,	:	No. 01688 Pittsburgh 1987
Appellant	:	

Appeal from the Order Entered November 2, 1987 in the Court of Common Pleas of Allegheny County, Civil No. G.D. 84-16716.

BEFORE: CIRILLO, P.J., and CAVANAUGH, BROSKY, McEWEN, OLSZEWSKI, BECK, TAMILIA,* POPOVICH and JOHNSON, JJ.

OPINION BY CIRILLO, P.J.: FILED: January 4, 1990

This is an appeal from an order of the Court of Common Pleas of Allegheny County, granting United States Steel Corporation's (hereinafter USX) motion for a new trial, and denying its motion for judgment *non obstante veredicto*. **We affirm.**

In 1984, USX maintained and partially operated a steel manufacturing plant, known as the Carrie Furnace Works, along the eastern bank of the Monongahela River in the borough of Swissvale. Between December of 1983 and June of 1984, Andrew Carter, a fourteen year-old resident of Swissvale, frequently trespassed with his friends, including Christian Stonebraker, on the plant property. While steel manufacturing at the plant had ceased, an electric generating plant remained in operation and security patrolled the plant at irregular intervals.

The generating plant produced and transmitted electricity for the Homestead Works across the river. The electricity was transmitted through high voltage lines suspended on fabricated steel towers. Tower No. 13D, located in the western part of the plant, was of particular interest to Carter and his friends; it had open access to its base and a ladder that ascended the tower. The ladder began at ground level and extended upward 146 feet, affording entry to two platforms, one at the 112-foot level and the other at the 135-foot level.

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* Judge Tamilia did not participate in the decision of this case.

On the evening of June 1, 1984, Carter and Stonebraker entered the plant again. Stonebraker, who had climbed tower 13D on a prior visit, taunted Carter with attacks on his courage until Carter followed Stonebraker up the tower. After stopping briefly on the 112-foot platform, the pair climbed to the higher platform.

The platform at 135-feet had railing on two sides and was approximately fifteen feet by eight feet in size. Carter and Stonebraker decided to venture to the far edge of the platform on the side without a railing. To accomplish this, they had to duck under four grayish-colored insulated wires that draped to within four feet of the platform. Stonebraker maneuvered first and after passing under the first set of wires heard a crackling sound. He turned to see Carter receive a charge of electricity while his left hand touched one of the wires. Electric flashes discharged from Carter's hand, right shoulder, and left foot until he collapsed. Carter subsequently regained consciousness with some delirium. Stonebraker assisted him down the tower, through the plant and into a nearby field before going on for help.

As a result of the incident, Carter was hospitalized for several months and required numerous operations. His left hand, the small toe on his left foot, and part of his left forearm were amputated. Part of his right scapula was injured permanently, leaving scars.

On September 17, 1984, Carter's parents filed suit to recover damages on behalf of their minor son for the injuries he sustained and on behalf of Andrew Carter's father, Donald Carter, for the expenses incurred in effecting the recovery of his son. Trial by jury commenced on

February 6, 1987, and on February 13, 1987 the jury returned a verdict in favor of Andrew Carter in the amount of one million five hundred thousand dollars ($1,500,000.00). Because the jury also found Andrew Carter twenty percent negligent, the verdict was molded appropriately to arrive at a one million two hundred thousand dollar ($1,200,000.00) award.

USX filed motions seeking judgment n.o.v. or, in the alternative, a new trial. The Honorable Richard G. Zeleznik denied USX's motion for judgment n.o.v., and granted it motion for a new trial on liability and damages. The Carters filed this timely appeal from the order granting USX a new trial; USX cross-appealed from the order denying judgment n.o.v. We will address the Carters' issues in part I, and USX's cross-appeal with respect to the denial of judgment n.o.v. in part II.

I.

The Carters raise the following issues on appeal:

> 1. After receipt of a jury verdict in a civil action, can the trial judge, with the assistance of defense counsel, properly question each juror as to his awareness of publicity, discussion of the publicity during deliberations, and its effect on the juror's decisions, and then award the defendant a new trial on the basis of the publicity, which accurately described the occurrence of a subsequent accident on defendant's premises, evidence of which was admissible?
>
> 2. Can a defendant which submits to a medial interview while a trial is in progress and openly discusses a subsequent accident which occurred

on its premises later obtain a new trial on the basis of the resulting publicity about the subsequent accident?

3. Can a defendant obtain a new trial on the basis of allegedly prejudicial publicity even though it did not raise the issue during voir dire, did not inform the court of the publicity until after the jury had completed two hours of deliberations, and then elected to gamble on the verdict rather than request cautionary instructions?

Our standard of review from an order granting a new trial is, generally, whether the trial court clearly and palpably abused its discretion or committed an error of law which controlled the outcome of the case. *Stevenson v. General Motors Corporation*, 513 Pa. 411, 521 A.2d 413 (1987). However, where a trial court, in granting a motion for a new trial, gives a single reason for its decision, the validity of its legal justification for a new trial is at issue. Appellate review is then focused upon the legal adequacy of the reason given for the new trial. *Westinghouse Elevator Company v. Herron*, 514 Pa. 252, 523 A.2d 723 (1987). In the case before us, the trial court granted USX's motion for a new trial based solely on the prejudicial effect that the February 12, 1987 newspaper and television reports had upon the jury. Consequently, our duty is to review the legal adequacy of Judge Zeleznik's reason supporting his order granting USX a new trial.

On the morning of February 13, 1987, while the jury was deliberating, the trial court was alerted to two media reports released on February 12, 1987 concerning an accident subsequent to the Carter incident where 16 year old Orlando Dudley was killed at the Carrie Furnace Works.

At that point, counsel for USX requested that the jury be polled as to whether or not they had seen or heard of either the newspaper story or the television news report. Judge Zeleznik refused to interrupt jury deliberations at that time, opting to wait for the verdict. The jury then came in with a verdict awarding Carter $1.5 million dollars which was later molded to $1.2 million dollars, since the jury found Carter twenty percent negligent. After the verdict was read, Judge Zeleznik, along with counsel for the Carters and USX, questioned each juror individually in the judge's chambers. Judge Zeleznik asked each juror whether or not he or she was aware of either media report and whether the content of these reports changed their opinion regarding the outcome of the case.

While Judge Zeleznik's question as to whether or not a juror was *aware* of either of the media reports was permissible, his questions as to the *effect* of the reports on the jurors' deliberations were impermissible, therefore error on the part of the trial judge. Questions put to a juror regarding the process by which the verdict is reached is impermissible, as a juror may not impeach his own verdict by testifying about his thought process during deliberations. *See Commonwealth v. Carr*, 370 Pa. Super. 1, 535 A.2d 1120 (1987). After the inquiry revealed that jurors numbers four, eight, and ten had changed their opinion after seeing or hearing about the news report, USX filed a motion for judgment n.o.v. or, in the alternative, a new trial. Judge Zeleznik denied judgment n.o.v., but granted a new trial in favor of USX, finding that the news report was extraneous information that had a prejudicial impact on the jury. Notwithstanding Judge Zeleznik's error in questioning the jurors regarding the

effect of the media reports on their deliberations, the trial court's order granting a new trial will be affirmed.

We disagree with the view, as expressed in Judge Olszewski's Concurring and Dissenting Opinion, that the newscast did not constitute an extra-evidentiary prejudicial influence on the jury. Ignoring the testimony of the jurors as to the effect of the news report, it is clear that the jury's receipt of the evidence of the subsequent accident at Carrie Furnace Works was prejudicial.

Pennsylvania case law holds that accidents subsequent to the one in question may only be admitted for a limited purpose, for example, as evidence of a dangerous condition. *See, e.g., Yoffee v. Pennsylvania Power & Light Co.*, 385 Pa. 520, 123 A.2d 636 (1956) (evidence of a plane accident which occurred after the one that killed plaintiff's decedent was admissible to prove the dangerous condition of electrical wires strung across a river between two towers. *See also* Packel and Poulin, Pennsylvania Evidence, § 412.2 (West 1987). Assuming in the instant case that the evidence of the subsequent Dudley case would have been admissible, the evidence would have only been admissible for one purpose, to show the dangerous condition of USX's facility. When evidence is admissible for a limited purpose, the jury must be given a cautionary instruction limiting their use of the evidence if such an instruction is requested by the party against whom the evidence is being used:

> [E]vidence which is admissible for one purpose or against one party is not rendered inadmissible because it is inadmissible for another purpose or against another party. When the general rule is followed and the evidence is admitted,

> there is a risk that the jury will consider the evidence for the inadmissible purpose. In view of this, the opposing party is entitled to an instruction explaining to the jury the purpose for which the evidence may be considered and the purpose for which it may not be considered. The opposing party must request such an instruction.

Packel and Poulin, Pennsylvania Evidence, § 105 (West 1987) (footnotes omitted). *See also Bialek v. Pittsburgh Brewing Co.*, 430 Pa. 176, 185, 242 A.2d 231, 235, (1968); *Incollingo v. Ewing*, 444 Pa. 263, 294, 282 A.2d 206, 233, (1969). If the Carters had sought to admit evidence of the Dudley case at trial, and the court had allowed it to be admitted, USX would have been entitled to a jury instruction explaining the limited purpose for which this evidence could be considered by the jury in reaching their verdict.

Since the information concerning the Dudley case was made known to the jury outside of the evidence presented in the courtroom, the jury was left to consider this information without a proper limiting instruction. Left unqualified in the minds of the jury, evidence of the Dudley incident could have been considered by the jury in a manner prejudicial to USX. Because the jury received this information without benefit of any instruction, we find that the media reports were prejudicial and destroyed USX's chance for a fair trial.

The Carters also argue that the fact that a representative of USX openly discussed the subsequent accident with the media during the trial of this action should preclude it from obtaining a new trial based on publicity

about the subsequent accident. We disagree with this argument. USX did not "educe[] the evidence to which [it] objects . . . " *Ellsworth v. Lauth*, 311 Pa. 286, 290, 166 A. 855 (1933). USX did not contact the media; a newspaper reporter from the Post-Gazette contacted USX's Public Affairs Manager. Moreover, the trial judge stated that when the Carter trial was commencing, the newspaper reporter contacted the court and the court permitted her to read the complaint. In our opinion, the appellant has failed to show that USX in any way provoked this media coverage.

II.

USX raises the following issue in its cross-appeal:

> When a minor plaintiff has been injured while trespassing on defendant's electrical transmission tower and plaintiffs failed to establish at trial that defendant knew or had reason to know that children were likely to trespass there, failed to establish that defendant knew or had reason to know that a condition on its property involved an unreasonable risk to children, failed to establish that the minor plaintiff did not realize the risk involved, and failed to establish that defendant breached the duty of care normally owed a trespasser, is defendant entitled to a compulsory non-suit or judgment n.o.v.?

When reviewing the propriety of an order granting or denying judgment n.o.v., we must determine whether there was sufficient competent evidence to sustain the verdict, granting the verdict winner the benefit of every reasonable inference that can reasonably be drawn from

the evidence and rejecting all unfavorable testimony and inferences. *Mitzelfelt v. Kamrin*, ___ Pa. Super. ___, ___, 549 A.2d 935, 937-938 (1988). "Judgment n.o.v. may be granted only in a clear case where the facts are such that no two reasonable minds could fail to agree that the verdict was improper. *Id.* at ___, 549 A.2d at 938, citing *Ingrassia Construction Co., Inc. v. Walsh*, 337 Pa. Super. 58, 61, 486 A.2d 478, 480 (1984). We submit that this is not a clear case, such that "no two reasonable persons could disagree that the verdict was improper." *McCloskey v. New York Life Insurance Co.*, 292 Pa. Super. 1, 436 A.2d 690 (1981). *See also Frank v. Peckich*, 257 Pa. Super. 561, 391 A.2d 624 (1978) (the rendering of a judgment n.o.v. is a drastic act and should be entered only when the facts are such that no two reasonable persons could fail to agree that the verdict was improper).

This action was based upon section 339 of the Restatement (Second) of Torts, which was adopted by our supreme court in *Bartleson v. Glen Alden Coal Co.*, 361 Pa. 519, 64 A.2d 846 (1949). Section 339 sets forth the prerequisites for successfully asserting a claim for injuries to children trespassing into highly dangerous artificial conditions as follows:

> **§ 339. Artificial Conditions Highly Dangerous to Trespassing Children**
>
> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
>
> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

> (b) the condition is one of which the p[ossessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
>
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
>
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise protect the children.

Restatement (Second) of Torts § 339.

We find that there is sufficient evidence of record to support the verdict. First, it is reasonable to conclude that USX knew or had reason to know that children were likely to trespass at the plant. John Stasko, the general foreman for the Carrie Works on June 1, 1984, testified that numerous incidents of vandalism, including windows being broken, lockers overturned, and tools strewn about, had occurred prior to the incident in question. Moreover, Mr. Stasko testified that he found a dirt bike on the property the same day that Carter was injured. Additionally, the jury was presented with evidence that children had been seen on the property on numerous occasions and that USX employees knew of the trail leading from the plant to the playing field and playground, located only one-third of a mile from the plant. In fact,

Carter and Stonehouse [sic] admitted that they had been at Carrie Works on several other occasions. Finally, the tower did not have any warning signs and Carrie Works had not been used for a lengthy period of time prior to the accident. Therefore, it was reasonable for the jury to conclude that USX was aware that children were likely to trespass.

Second, we find that USX realized or should have realized that the Carrie Works, and specifically the tower, involved an unreasonable risk of serious bodily harm to trespassing children. While we agree with USX's assertion that the tower is located on private property and that the danger from high voltage wires was over one hundred feet in the air, our supreme court has stated that:

> There is no rule which requires that the dangerous condition must be on the ground or within reach of a minor. Such a distinction is artificial, without logic or experience to support it. What this distinction drives at is the question of whether or not a defendant shall be held reasonably to anticipate that a child will bring himself within the orbit of danger.

Bartleson, 361 Pa. at 528, 64 A.2d at 851.[1] In its brief, USX omits critical facts which were available to the jury.

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[1] Contrary to USX's protestations, *Bartleson* is strikingly similar to this case. In Bartleson, an eleven year-old child was electrocuted on a high tension transmission tower. The tower was surrounded by a seven-foot high fence with two six-foot high gates. Children frequently played in the area. Well-worn paths passed close by the tower. Railroad tracks surrounded the area. One day, the gate to the tower was open. Several

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There was testimony that a ladder led from the base of the tower directly to the tower platform high above the ground. The high voltage wires were easily within reach of any youth who had climbed up the tower; moreover, the tower was readily accessible to climbing by a child. Expert witnesses and USX employees testified that the tower was not enclosed by a fence or any type of barrier to prevent inquisitive children from climbing and encountering the perils of high voltage wires. Bearing in mind the jury's determination that USX was aware of the child trespassers, we find that the jury had sufficient evidence before it to conclude that the hazards posed to those children were unreasonable.

Third, USX avers that Andrew Carter realized the risk involved when he entered the Carrie Works and climbed the tower. To the contrary, the record reflects that Carter and Stonebraker testified that they believed the electricity had been shut off because the plant appeared to be abandoned. They visited the Carrie Works on other occasions prior to the day of the incident, climbing different structures in the area. Stonebraker had climbed tower 13D in the presence of Carter on at least one occasion. Neither youth saw signs warning of dangerous conditions on the tower, but they did admit to listening for buzzing noises to ascertain whether the voltage lines

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youths believed the power was shut off since the gate was open. They climbed up the tower on metal studs which protruded from the column. Eventually, one youth came into contact with live electrical wires. This court affirmed a jury verdict in favor of the plaintiff, based upon Section 339 of the Restatement (Second) of Torts.

were active. USX emphasizes in its brief that Carter knew he was on private property, believed that tower 13D carried power to mills along the river, and knew that his parents would have forbidden him to go to the plant had they known of his intention to play at the Carrie Works. It is this precise type of behavior that is covered by Section 339 of the Restatement (Second) of Torts. An adult acting with reasonable rationality might very well conclude that the abovementioned considerations would weigh against climbing the tower. Unfortunately, Carter evaluated the situation from a child's perspective. He weighed the potential for harm against both the peer pressure applied by Stonebraker and the allure of climbing, ultimately reaching an unwise, naive conclusion, i.e., the tower was safe to climb.[2] The ability of Carter to fully appreciate the danger was a question for the jury, which found by its verdict that he did not fully comprehend the danger. *See Felger v. Duquesne Light Co.*, 441 Pa. 421, 273 A.2d 738 (1971); *Hyndman v. Pennsylvania Railroad Co.*, 396 Pa. 190, 512 A.2d 251 (1959).

Judge Cavanaugh states in his Dissenting Opinion that "Andrew was fully aware of the risk of falling from a height equivalent to a fourteen-story building. He knew it was dangerous to be where he was." (Dissenting Opinion by Cavanaugh, J., at p. 6). However, Carter's testimony is certainly sufficient to justify a jury's conclusion that he was not aware of the specific risk of electrocution on the

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[2] That children will accept an invitation to climb is matter of common knowledge. *Bartleson*, 361 Pa. at 529, 64 A.2d at ___.

date of the date [sic] of the accident. Moreover, the testimony to which Judge Cavanaugh refers reveals that Carter saw the "Danger, High Voltage" sign *prior* to June 1, 1984; Carter testified on direct examination that on that particular date, the date of the accident, there was no sign. (R.R. 218a-219a). Carter also testified that based on the appearance and condition of the plant, he was of the opinion that the plant was not operable and had been abandoned; he stated that equipment and tools were scattered and rusted, no lights were on at night, lockers were tipped over, and, in general, the appearance of the plant was "run down." (R.R. 196a-219a).

In our view, this evidence was sufficient to raise a question for the jury as to whether Carter fully appreciated the risk of electrocution. *See Bethay v. Philadelphia Housing Authority*, 271 Pa. Super. 366, 375, 413 A.2d 710, 714 (1979) ("The question of a child's appreciation of danger is ordinarily one for the jury and not the court"); *see also Trawick v. Nationwide Mutual Insurance Co.*, 242 Pa. Super. 271, 363 A.2d 1265 (1976) (judgment n.o.v. is improper where there is a question of fact for the jury; it may not be utilized so as to invade the province of the jury).

Fourth, USX does not address whether the burden of maintaining the tower and the burden of eliminating the danger were slight compared to the risk to child trespassers. Despite the absence of an argument from USX, we shall evaluate the evidence on this point. It seems that USX was virtually unconcerned with the idle portion of the Carrie Works. When this section of the Carrie Works was operational, security were permanently posted at various locations around the facility. In May of 1984, one

month prior to the Carter incident, the security was changed from permanently posted guards to roving patrols covering an admittedly large area. The number of security men was substantially reduced, requiring roving patrols of the area around the tower to be limited to a maximum of two per day. Also, one expert witness testified that the tower did not conform to the safety standards set forth in the American National Standards Institute Electrical Code. Further, the youths testified as follows: there were scant warnings posted in the area, no fences obstructed them from entering the plant, the ladder on the tower was very accessible to them, and they had trespassed without detection on other occasions. Clearly, sufficient evidence was introduced from which a jury could conclude that USX could have acted to prevent children from encountering such risks.

Fifth, USX fails to present an argument that it could not reasonably have eliminated the danger to the children. For the express reasons stated in our discussion on the previous issue, we concur with the jury that USX could have eliminated the danger by reasonable means.

Finally, USX asserts that the contributory negligence of Carter was greater than the causal negligence of USX. The jury apportioned twenty percent of the negligence in this case to Carter. The totality of causal negligence is a matter properly before the jury. *White by Stevens v. Southeastern Pennsylvania Transportation Authority,* 359 Pa. Super. 123, 137, 518 A.2d 810, 817, *alloc.denied,* 529 A.2d 1083 (Pa. 1987). In reviewing a jury verdict on the apportionment of causal negligence, this court should be very reluctant to overturn the jury's decision. *Id.* After a thorough review of the evidence, discussed at length in this

opinion, we find that the trial court has not abused its discretion nor that the jury rendered a verdict which shocks our sense of justice.

The trial court's order granting a new trial and denying judgment n.o.v. is affirmed.

CAVANAUGH, J. files a DISSENTING OPINION

BROSKY, J. joins CIRILLO, P.J.

OLSZEWSKI, J. files a CONCURRING & DISSENTING OPINION

McEWEN, J. joins OLSZEWSKI, J.

BECK, J. joins CIRILLO, P.J.

POPOVICH, J. joins CAVANAUGH D.O.

JOHNSON, J. joins OLSZEWSKI C&D OPINION

ANDREW CARTER, A MINOR, BY HIS PARENT AND NATURAL GUARDIAN, DONALD CARTER, AND DONALD CARTER IN HIS OWN RIGHT,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	NO. 1652 Pittsburgh, 1987
v.	:	
UNITED STATES STEEL CORPORATION,	:	
Appellant	:	

Appeal From Order Entered
November 2, 1987
In Court of Common Pleas,
Civil Division,
Allegheny County, at No. G.D. 84-16716
Issue No. 126661

ANDREW CARTER, A MINOR, BY HIS PARENT AND NATURAL GUARDIAN, DONALD CARTER, AND DONALD CARTER IN HIS OWN RIGHT,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	NO. 1688 Pittsburgh, 1987
v.	:	
UNITED STATES STEEL CORPORATION,	:	
Appellant	:	

Appeal From Order Entered
November 2, 1987
In Court of Common Pleas,
Civil Division,
Allegheny County, at No. G.D. 84-16716

BEFORE: CIRILLO, P.J., CAVANAUGH, BROSKY, McEWEN, OLSZEWSKI, BECK, TAMILIA, POPOVICH and JOHNSON, JJ.

DISSENTING OPINION BY CAVANAUGH, J.: FILED: January 4, 1990

I respectfully dissent. I would enter judgment *non obstante veridicto* in favor of the United States Steel Corporation. The injuries in this case were not due to any legally inappropriate action or inaction on the part of United States Steel Corporation. The appellee, Andrew Carter, had the burden of proving by a fair preponderance of the evidence that the United States Steel Corporation was negligent and that its negligence was the proximate cause of the accident. *Flagiello v. Crilly*, 409 Pa. 389, 187 A.2d 289 (1963). In my opinion, he has not carried this burden.

On June 1, 1984 at about 7:00 P.M., Andrew Carter, who was then fourteen years old and an eighth-grade student, entered the Carrie Furnace Works of the United States Steel Corporation. He was with his friend, Christian Stonebraker, who was also fourteen years old at the time. Andrew knew that the plant was private property but he and his friend and another boy, Charles Baker, had been there about six times before. Andrew thought that the plant was not in operation as there were no signs of activity. However, he knew it was a "dangerous place" and he did not tell his parents that he went there because

they would not have wanted him to be there. There was a high electrical tower on the property approximately 145 feet in height near a cinder block building. Andrew was aware at that time that the building had a sign stating "Danger, High Voltage". The tower has two platforms, one at 112 feet and one at 135 feet from the ground. The one at 135 feet, where the accident occurred, was 15 feet x 8 feet and had a railing on only two sides. The plaintiff ventured out to the far edge of the platform which had no railing.

Andrew had attempted to climb the tower before but he was afraid to do so because of the height. His friend, Christian, had called him "chicken" on prior occasions for not climbing the tower and on this occasion, he was persuaded to join Christian in ascending the tower. Andrew was aware that electricity was dangerous and accordingly, he was listening for "buzzing" sounds while climbing the tower since he believed that if electricity were going through the lines, he would hear such a sound. He would have climbed down had he heard a buzz.

Andrew and his friends had entered the premises on about a half dozen occasions since Christmas of 1983 until June 1, 1984. However, Andrew and Charles Baker had not climbed the tower. On the day on which the tragic accident occurred, Christian Stonebraker ascended the tower first with Andrew following. When the boys reached a platform near the top, Andrew touched a high voltage wire and as a result, was seriously injured.

In my opinion, there was not sufficient evidence to sustain the verdict against United States Steel Corporation and the court below erred in denying the motion for

judgment *non obstante veridicto*. In reviewing the denial of a motion for judgment n.o.v., our sole duty is to decide whether there was sufficient competent evidence to sustain the verdict, granting the verdict winner the benefit of every favorable inference reasonably to be drawn from such evidence. *Curran v. Philadelphia Newspapers, Inc.*, 376 Pa. Super. 508, 546 A.2d 639 (1988); *Curran v. Stradley, Ronon, Stevens & Young*, 361 Pa. Super. 17, 521 A.2d 451 (1987). In determining whether the evidence is sufficient to support the verdict, a reviewing court must consider all the evidence received. *Niles v. Fall Creek Hunting Club, Inc.*, 376 Pa. Super. 261, 545 A.2d 926 (1988). Judgment n.o.v. should be entered when the facts are such that no two reasonable persons could disagree that the verdict was improper. *McCloskey v. New York Life Insurance Company*, 292 Pa. Super. 1, 436 A.2d 690 (1981); *Robertson v. Atlantic Richfield Petroleum Co.*, 371 Pa. Super. 49, 537 A.2d 814 (1987); appeal denied ___ Pa. ___, 551, A.2d 216 (1988).

The theory of the plaintiff's case was based on Restatement (Second) of Torts, § 339 which provides:

> **§ 339. Artificial Conditions Highly Dangerous to Trespassing Children.**
>
> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
>
> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
>
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
>
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

Section 339 has been adopted as the law of this Commonwealth. *See Jesko v. Turk*, 421 Pa. 434, 219 A.2d 591 (1966). Nevertheless, the burden is on the trespassing child to prove that all of the conditions of § 339 are met. *Scarborough v. Lewis*, 359 Pa. Super. 57, 518 A.2d 563 (1986). The plaintiff below did not prove the conditions set forth in clauses (b) and (c). The comment to clause (b) states *inter alia:*

> **i. When risk such that children can be expected to appreciate it.** The duty which the rule stated in this Section imposes upon the possessor of land is based upon the well-known tendency of children to trespass upon the land of others and the necessity of protecting them, even though trespassers, from their childish lack of attention and judgment. *The duty of the possessor, therefore, is only to exercise reasonable care to*

keep the part of the land upon which he should recognize the likelihood of children's trespassing free from those conditions which, though observable by adults, are likely not to be observed by children, or which contain the risks the full extent of which an adult would realize but which are beyond the imperfect realization of children. It does not extend to those conditions the existence of which is obvious even to children and the risk of which should be fully realized by them. This limitation of the possessor's liability to conditions dangerous to children, because of their inability to appreciate their surroundings or to realize the risk involved, frees the possessor of land from the liability to which he would otherwise be subjected by maintaining on the land the normal, necessary and usual implements which are essential to its normal use, but which reckless children can use to their harm in a spirit of bravado or to gratify some other childish desire and with as full a perception of the risks which they are running as though they were adults.

* * *

j. *There are many dangers, such as* those of fire and water, or of *falling from a height, which under ordinary conditions may reasonably be expected to be fully understood and appreciated by any child of an age to be allowed at large. To such conditions the rule stated in this Section ordinarily has no application, the absence of some other factor creating a special risk that the child will not avoid the danger,* such as the fact that the condition is so hidden as not to be readily visible, or a distracting influence which makes it likely that the child will not discover or appreciate it.

Where, however, the possessor knows that children too young to appreciate such dangers are likely

to trespass on his land, he may still be subject to liability to such children under the rule stated.

(Emphasis added).

Andrew was fully aware of the risk of falling from a height equivalent to a fourteen-story building. He knew it was dangerous to be where he was.[1] He was also fully

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[1] Andrew Carter testified as follows:

Q. And am I correct that you went down there about the same number of times that Mr. Stonebraker did, five or six times, or did he go down there more than you did?

A. We never went down there without the other one, to the best of my recollection, and it would be about five to six times.

Q. I take it that you preferred not to tell your parents, because you knew they would object if you did?

A. Yes.

Q. *Why would they object?*

A. *Because they're parents. It's a dangerous place.*

Q. *It's a dangerous place, it's unsafe and they wouldn't want you down there.*

Isn't it true, Andrew, that your dad over the years has instructed you to stay out of unsafe areas?

A. Yes.

Q. Didn't he also tell you about electricity or advise you of its potential nature over the years?

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aware of the risk involved if there had been electricity in the wires. He listened for a buzzing sound as he and his

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(Continued from previous page)

A. Yes.

Q. And so you know better than to stick a fork into an electrical outlet in the house, certainly?

A. Yes.

Q. *And you know electricity is dangerous?*

A. *Yes.*

* * *

Q. You mentioned the size of the sign that was on the cinder block building, and you tried to compare it to the signs that were located on the other side of the cinder block building.

There's no question that you read that sign on that cinder block building, is there?

A. No.

Q. You saw that sign on that door

A. Yes.

Q. Prior to June 1, 1984, didn't you?

A. Yes.

Q. *And that sign said, Danger, High Voltage; is that right?*

A. *Yes.*

Q. And I take it that that particular cinder block building was located immediately adjacent to the tower that you climbed; isn't that right?

(Continued on following page)

companion climbed the tower, and although he was tragically mistaken as to the presence of electricity in the wires, he was fully aware of the danger from live wires.

(Continued from previous page)

A. Yes.

Q. And as a matter of fact, you had attempted to climb that tower before, and you weren't able to do it; isn't that right?

A. Yes.

Q. And you didn't do it, because you were scared and afraid, and you didn't want to go up there and – strike that.

You didn't do it, because you got scared and backed down; isn't that right?

A. No. It was because of the heights, sir.

Q. So you know there was danger from the heights, there's no question about that?

A. Yes.

* * *

Q. Isn't it true, Andrew, that on June 1, 1984, it was your understanding that if electricity was going into a line, it would make a buzzing noise?

A. Yes.

Q. And didn't you listen for buzzing noises when you went up that tower?

A. Yes.

Q. And isn't it also true, Andrew, that if you had heard buzzing noises, you would have come back down?

(Continued on following page)

Andrew's father was an architect and had warned him to stay away from unsafe places. He knew of the

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(Continued from previous page)

A. Yes.

Q. And the reason you would have come back down was because there would be electricity in that tower; isn't that right?

A. Yes.

Q. You didn't hear buzzing noises, even though you listened for them, and so you continued to climb; right?

A. Yes.

* * *

Q. You never asked anybody whether the plant was shut down or not, did you?

A. How could I have asked anyone? Ask who?

Q. *You could have asked your father; isn't that right?*

A. *I could have, but why would I? That would only get me in some trouble.*

Q. So you didn't want to ask your father whether the plant was shut down, because you were afraid you were going to get into trouble, because he wouldn't want you down there in the first place; isn't that right?

A. *Well, no parent would.*

Q. You didn't ask any of your classmates if the plant was shut down, did you?

A. No.

(Emphasis added).

danger involved in climbing to great heights and in electricity.

The requirements of Clause (c) were patently not met. The Restatement states in its comment to § 339:

Comment on Clause (c):

m. A possessor of land is, under the statement made in Comment e, under a duty to exercise reasonable care to keep so much of his land as he knows to be subject to the trespasses of young children, free from artificial conditions which involve an unreasonable risk of death or serious bodily harm to them. This does not require him to keep his land free from conditions which even young children are likely to observe and the full extent of the risk involved in which they are likely to realize. *The purpose of the duty is to protect children from dangers which they do not appreciate and not to protect them against harm resulting from their own immature recklessness in the case of known and appreciated danger. Therefore, even though the condition is one which the possessor should realize to be such that young children are unlikely to realize the full extent of the danger of meddling with it or encountering it, the possessor is not subject to liability to a child who in fact discovers the condition and appreciates the full risk involved, but none the less chooses to encounter it out of recklessness or bravado.*

Illustration:

8. The A Railroad Company maintains upon its land an unlocked turntable, upon which, as it knows, children of the neighborhood frequently trespass, and which involves an unreasonable risk of harm to such children. On

two occasions, B and C trespass upon the land, play with the turntable, and each is injured when his foot is caught in it. B is a boy sixteen years of age, whose maturity and experience make him fully understand and appreciate the danger. C is a boy nine years of age, who is the son of a railroad engineer, has been repeatedly warned against the turntable, and likewise fully appreciates the danger. A Railroad is not liable to B or to C.

(Emphasis added).

In the instant case, Andrew was subjected to pressure from his companion to climb the steel tower. Christian Stonebraker testified as to what occurred when he and Andrew arrived at the mill, as follows:

Q. Did you talk about climbing the electrical tower when you got down there?

A. Once we were inside the mill, yes.

Q. Who brought up the subject?

A. I don't recall.

Q. Did you say anything to Andrew about the safety of the tower?

A. Yeah. I told him it was really safe, everything was secure.

Q. Was it necessary to tell him that?

A. Because he inquired on whether it was safe or not.

Q. Why did you think it was safe?

A. Because I had climbed it before, and everything appeared strong.

Q. Now, when you said it was safe, were you alluding to the structure, or were you alluding to the condition of wires in the vicinity?

A. The structure itself.

Q. Did you have any concern about the wires on top of this tower?

A. No, sir.

Q. Why not?

A. I figured since the mill appeared abandoned, there would be no need for electricity. I thought the wires had just been shut off.

The appellee contends that the case is analogous to *Bartleson v. Glen Alden Coal Co.*, 361 Pa. 519, 64 A.2d 846 (1949), in which an eleven year-old boy climbed a high tension transmission tower to a height of 15 ft. while playing cowboys and indians and was electrocuted. The Supreme Court held that § 339 was applicable and affirmed the judgment for the plaintiff. The tower in that case was surrounded by a fence which was generally locked. The gate had been locked for years and children played in the area of the fence almost continuously over the years. On the date in question, some children, including the plaintiff, noticed that the gate was open and some of the boys thought the power was shut off because the gate was left wide open. The plaintiff did not know the tower was dangerous. The Supreme Court pointed out that there were three well-worn paths close by the tower which were frequently used by people in the neighborhood in going to school, church and work. This contrasts with the situation in our own case where the mill site was about three-quarters of a mile from a playground and

access was available only along railroad tracks as the rest of the mill was fenced in. In addition, the plaintiff in Bartleson only climbed to a height of 15 feet, which is substantially different from climbing a tower that is approximately 145 feet in height.

In *Jennings v. Glen Alden Coal Co.*, 369 Pa. 532, 87 A.2d 206 (1952) the Supreme Court held that the court below properly entered a non-suit against the plaintiff whose cause of action was based on § 339. In that case, a thirteen year-old boy went swimming in a pool on an abandoned strip mine containing water of a depth of 25 feet. The area was wild and uncultivated and the pool was about a half-mile from the highway. On two previous occasions, boys went swimming and people occasionally hunted and picked berries on the site. The Supreme Court held that this did not prove that the defendant knew, or had reason to know of the trespassers. The court further noted at 369 Pa. 536, 87 A.2d 208:

> It certainly cannot be said that a normal boy thirteen and one-half years of age who has been in and around water often enough to have learned how to swim does not realize the risk involved in swimming in deep water.

In *Felger v. Duquesne Light Co.*, 118 P.L.J. 79 (1970), affirmed; 441 Pa. 421, 273 A.2d 738 (1971), the plaintiff was a fourteen year-old boy who climbed a pole containing electric wires and was seriously injured when he touched the wire. A parking lot where the pole was located had been used for many years as a playground for children. The plaintiff had received no warning about the dangers of electricity or climbing telephone poles. He reached the pole by climbing onto a 3 foot high wall and

then climbed the pole. A verdict was entered for the plaintiff and the court entered judgment n.o.v. as all of the conditions of § 339 had not been satisfied. The case is clearly analogous to our own and readily distinguishable from *Hyndman v. Pennsylvania Railroad Co.*, 396 Pa. 190, 152 A.2d 251 (1959). In *Hyndman*, a boy scout troop occupied a campsite about 25 feet from a railroad right of way. The camp was located only 50 feet from a catenary pole containing live wires. The boy scout camp was frequented for a long period of time before the accident and boys often climbed the pole to a platform 20 feet above the ground. The plaintiff was an eleven year-old boy and unaware of the danger involved, climbed to the platform. He touched the wires and was severely burned. He was also knocked from the platform to the ground. Judgment for the plaintiff was affirmed by the Supreme Court on the grounds that the conditions of § 339 had been met. The Supreme Court also noted that after the accident the defendant attached signs to the tower reading "Danger, Live Wire, Keep Off."

In the case before us, the imposition of liability on United States Steel would make the defendant an insurer. The plaintiff was a fourteen year-old boy who was fully aware of the risks involved in climbing a 145 feet high electrical tower, both as to the danger involved in climbing to such a height and the risk if electricity was present in the wires. He was aware of the sign stating "Danger, High Voltage" located on a cinder block building immediately adjacent to the tower that he climbed.[2] The

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[2] The majority opinion states at slip opinion, p. 22, "Finally, the tower did not have any warning signs . . . " The

(Continued on following page)

plaintiff was induced to climb the tower by his companion, who previously said he was "chicken" for not attempting this. The evidence was not sufficient to sustain a verdict for the plaintiff. The mere happening of an accident does not raise an inference or presumption of negligence, nor even make out a prima facie case of negligence. *Churilla v. Barner*, 269 Pa. Super. 100, 409 A.2d 83 (1979). Imposition of liability under Section 339 requires proof of negligence. *Scarborough v. Lewis*, 359 Pa. Super. 57, 518 A.2d 563 (1986). While we are sensitive to the very serious injuries suffered by the plaintiff, we should not allow this to permit imposition of liability upon a defendant where none exists under the law.

I would reverse and grant judgment *non obstante veridicto*.

Having reviewed the Opinion of Cirillo, P.J. with my conclusion as to the grant of judgment n.o.v., I adhere to the opinion that the grant of judgment n.o.v. is the appropriate disposition of this case. Nevertheless, if I were to reach the issue of the propriety of the newspaper and television reports, I would grant a new trial because of the prejudicial nature of the reports.

POPOVICH, J. joins the DISSENTING OPINION by CAVANAUGH, J.

(Continued from previous page)

plaintiff himself testified that there was a warning sign of which he was aware located on a building immediately adjacent to the tower.

ANDREW CARTER, A MINOR, BY HIS PARENT AND NATURAL GUARDIAN, DONALD CARTER, and DONALD CARTER, IN HIS OWN RIGHT,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	:	
v.	:	
UNITED STATES STEEL CORPORATION,	:	
Appellee	:	No. 1652 Pittsburgh 1987

Appeal from Order entered November 2, 1987, in the Court of Common Pleas of Allegheny County, Civil, No. GD 84-16716, Issue No. 126661.

ANDREW CARTER, A MINOR, BY HIS PARENT AND NATURAL GUARDIAN, DONALD CARTER, and DONALD CARTER, IN HIS OWN RIGHT,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellees	:	
v.	:	
UNITED STATES STEEL CORPORATION,	:	
Appellant	:	No. 1688 Pittsburgh 1987

Appeal from Order entered November 2, 1987, in the Court of Common Pleas of Allegheny County, Civil, No. G.D. 84-16716.

BEFORE: CIRILLO, P.J.; CAVANAUGH, BROSKY, McEWEN, OLSZEWSKI, BECK, TAMILIA,* POPOVICH, and JOHNSON, JJ.

CONCURRING AND DISSENTING OPINION BY OLSZEWSKI, J.: FILED: January 4, 1990

We, too, would affirm the trial court's order denying judgment n.o.v.; however, we cannot join the majority's decision to affirm the trial court's order granting a new trial in favor of the United States Steel Corporation (USX) on any grounds.

The Carters assert that we should reverse the trial court granting new trial on grounds of prejudicial publicity. We believe that the prejudicial publicity did not constitute an extra-evidentiary prejudicial influence sufficient to justify a new trial; accordingly, we would reverse.

Initially, we note that the learned trial judge, apparently in accordance with standard practice in Allegheny County, recessed the jurors for the evening promptly at 5 p.m., even though they had not yet reached a verdict. We believe that the better practice in such cases is to keep the jurors at the courthouse later, allowing a break for dinner if necessary, until it becomes apparent that the jurors cannot reach a verdict by a reasonable hour. Naturally, jurors should not be coerced into reaching a quick verdict by the threat of a late night at the courthouse; however, trial courts should try to avoid giving jurors any opportunity to be exposed to information not presented in the

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(*Tamilia, J., did not participate in the consideration or decision of this case.)

evidence. When there is a risk that the jury will be exposed to information not in evidence, the trial judge should consider sequestering the jury. If such a practice had been followed in the present case, we might not be faced with this difficult decision. We now turn to the merits of this appeal.

I. New Trial on Grounds of Prejudicial Publicity

The majority treats the media accounts in this case as if they had been offered into evidence without proper instructions. Opinion at 7-8. We do not agree with their means of analysis, nor with the result it achieves. We emphasize that these accounts were not evidence. The second incident at Carrie Furnace Works was never offered into evidence nor admitted. No testimony regarding the second event was ever elicited at trial. The majority uses an inapposite analysis in order to look into the deliberations of the jury.

As the majority points out, jurors may not impeach their own verdicts. Opinion at 6. The well-settled policy of this Commonwealth protects the inviolability of jury deliberations. *Commonwealth v. Williams*, 514 Pa. 62, ___, 522 A.2d 1058, 1065 (1987), *quoting Cluggage v. Swan*, 4 Binney 150 (1811).

> [T]he verdict as uttered is the sole embodiment of the jury's act and must stand as such without regard to the motives or beliefs which have led up to its act. The policy which requires this is the same which forbids a consideration of the negotiations of parties to a contract leading up to the final terms as deliberately embodied in their deed, namely, the loss of all certainty in the

> verdict, the impracticability of seeking for definiteness in the preliminary views, the risk of misrepresentation after disclosure of the verdict, and the impossibility of expecting any end to trials if the grounds for the verdict were allowed to effect its overthrow.

8 *Wigmore on Evidence*, §2349, rule (a).

To this end, as a general rule, once the jury is polled and the verdict is recorded, the process by which the verdict is reached is not subject to impeachment by the jurors. *Commonwealth v. Carr (1987)*, ___ Pa.Super. ___, ___, 535 A.2d 1120, 1126 (1987), *citing Commonwealth v. Fowler*, 362 Pa.Super. 81, 523 A.2d 784 (1987); *see also Commonwealth v. Stark*, 363 Pa.Super. 356, 526 A.2d 383 (1986). A juror is, therefore, incompetent to testify as to what occurred during deliberations in the jury room. *Fink v. Commonwealth*, 85 Pa.Commw. 290, ___, 482 A.2d 281, 284 (1984), *citing Pittsburgh National Bank v. Mutual Life Insurance Company*, 493 Pa. 96, 425 A.2d 383 (1981); *see also Commonwealth v. Pierce*, 453 Pa. 319, ___, 309 A.2d 371, 372 (1973), *quoting Friedman v. Ralph Brothers, Inc.*, 314 Pa. 247, 249, 171 A. 900, 901 (1934).

A narrow exception to this general rule permits a juror to testify post-trial as to the existence of outside influences that may have prejudiced the deliberations. *Williams, supra*, at ___, 522 A.2d at 1066, *citing Commonwealth v. Sero*, 478 Pa. 440, 387 A.2d 63, 67 (1978); *Commonwealth v. Zlatovich*, 440 Pa. 388, 269 A.2d 469 (1970); *Welshire v. Bruaw et al.*, 331 Pa. 392, 200 A. 67 (1938); *see also Commonwealth v. Fuller*, 336 Pa.Super. 507, ___, 485 A.2d 1197, 1198 (1984). This exception developed upon

the recognition by our Supreme Court that "we can maintain the viability of the jury as a judicial decision-making body only by guaranteeing that a verdict is reached by evidence and argument in open court, not by outside influences that might strip the jury of the impartiality we demand." *Sero, supra,* at ___, 387 A.2d at 67.

To effectuate this exception to the rule, a juror may testify as to the nature of the outside influence but is incompetent to testify as to the effect that this influence may have had in reaching a decision.

> The ABA Standards pertaining to Trial by Jury, at § 5.7(a), direct that "[u]pon an inquiry into the validity of a verdict, no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined." This is consistent with the well-settled principle of public policy in this Commonwealth that "post-trial affidavits and evidence of jurors elicited by the examination of counsel or by a litigant for the purpose of . . . impeaching the verdict are improper, and such practice is to be discouraged." 38 P.L.E. Trial §397. See: *Commonwealth v. Pierce,* 453 Pa. 319, 309 A.2d 371 (1973). "Little will be gained and much lost by such inquiries." [*Zlatovich, supra,* at 396, 269 A.2d 473].

Fowler, supra, at ___, 523 A.2d at 786-787.

This exception to the virtual inviolability of jury verdicts is applied only in very limited and compelling circumstances. *Williams, supra* (death sentence cannot stand where jurors were informed that appellant was wanted in two other states on murder charges); *Commonwealth v.*

Santiago, 456 Pa. 265, 268, 318 A.2d 737 (1974) (a new trial warranted where alternate juror informed that defendant had killed others in addition to the victim in the case); *Welshire v. Bruaw*, 331 Pa. 392, 200 A. 67 (1938) (inherently coercive effect of tipstaff's conduct in pressuring jurors to reach a prompt decision on jury's deliberations warranted a new trial); *but cf. Commonwealth v. Syre*, 513 Pa. 1, 518 A.2d 535 (1986), *overruling* 348 Pa.Super. 110, 501 A.2d 671 (1985) (alternate juror's testimony that court crier had advised one juror that every person who asks for jury trial is guilty not prejudicial given juror's denial of such conversation); *Fowler, supra* (jurors viewing television program dealing with rape between days of deliberating not prejudicial even though one juror testified that "he could not be certain" that program had not affected his deliberations); *Sero, supra* (information conveyed to jurors that defendant had begun to read Bible after wife's death does not create potential for prejudice).

Instantly, the trial court determined that extraneous information had come to the jury's attention and that, as a consequence, " . . . it became necessary to determine whether that information itself was prejudicial." Opinion at 13. In making this determination, however, the learned trial judge improperly questioned the jurors as to the effect of the television broadcast on their deliberations. The trial court determined that the extra-evidentiary information was prejudicial because it "raises an immediate adverse inference as to defendant's contempt for the lives of trespassing children. . . . " Opinion at 14.

The learned trial judge erred when he invaded the privacy of the jury room and questioned the jurors as to the effect of the extra-evidentiary influences. "It [is]

improper for the trial court . . . to interrogate an individual juror regarding the mental processes by which he had reasoned and then permit the juror to be cross-examined by defense counsel." *Fowler, supra,* at ___, 523 A.2d at 787.

In any event, we believe that the the [sic] prejudicial effect of the article and news broadcast was not of such a magnitude as to permit the impeachment of the jury's verdict. We do not find any of the compelling circumstances present in the instant case nor do we believe we should carve such an exception to the rule prohibiting impeachment of a jury verdict. We do not find the newscast to be an extra-evidentiary prejudicial influence as contemplated by the law of this Commonwealth. It is a well-established principle of public policy that post-trial testimony by jurors for the purpose of "impeaching the verdict is improper, and such practice is to be discouraged." *Fowler, supra,* at ___, 523 A.2d at 787, *quoting* 38 P.L.E. Trial §397.

Furthermore, we do not believe that a new trial should be granted because we believe USX was partially responsible for the situation it complains of. On the morning of February 13, 1987, USX's counsel asked the court to poll the jury to learn whether anyone had seen the media accounts of the second incident at Carrie Furnace Works.[1] The trial court chose not to poll the jury at

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[1] We believe the course of action suggested by USX's counsel is the better practice. In cases like this one, where prejudicial matter is published while the jury is deliberating, a trial court should poll the jury to see if any of them have been exposed to the publicity. If they have, the judge and counsel

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that time, and opined, "Maybe no one read [the media accounts] at all. Maybe you will get a defense verdict, then it becomes moot." At that time, USX's counsel withdrew its motion. Transcript, 2/13/87, at 15. USX acquiesced to the court's decision not to poll the jury until after the verdict was received. "A party may not sit by silent, taking his chances on a verdict, and, if it is adverse then complain of matters which, if error, could have been eradicated during the trial if brought to the court's attention properly and timely." *Krywucki v. Trommer*, 199 Pa.Super. 145, ___, 184 A.2d 389, 394 (1962), *citing Segriff v. Johnston*, 402 Pa. 109, 166 A.2d 496 (1960).

In the present case, the issue was brought to the court's attention; however, USX withdrew its motion and took the chance that, as the court suggested, the jury might come back with a defense verdict. Having taken that chance, the defense cannot now complain.

II. USX's Alternative Grounds For Granting A New Trial

USX presented two alternative grounds for granting a new trial. These alternative grounds were not addressed by the majority or by the trial court because they would

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for both sides should see the affected jurors in chambers, to establish whether those jurors can remain fair and impartial and base their verdict solely on evidence presented in court. If the affected jurors cannot do so, then a mistrial should be declared. If they can be fair and impartial, then the court should instruct them not to discuss the publicity with their fellow jurors.

grant new trial on grounds of prejudicial publicity. We do not believe either of these alternative grounds justify a new trial.

First, USX asserts that the trial judge improperly exercised his discretion in permitting the jury to view the involved premises. The record reflects that, on February 6, 1987, the jury was taken to view the Carrie Furnace Works. Our Pennsylvania Rules of Civil Procedure provide that a party may apply for a jury view of any premises involved in the litigation. Pa.R.C.P. 219. "[T]he allowance of the application shall be within the discretion of the court. . . . " *Id.* The purpose of a view is to better enable the jurors to understand the testimony and to assist them in weighing conflicting testimony. *Lobozzo v. Adam Eidemiller,* 437 Pa. 360, 366, 263 A.2d 432, 435 (1970) (citations omitted). A trial court should not grant a view if the condition of the premises has changed substantially between the date of the accident and the time of trial. *Garris v. McClain,* 399 Pa. 261, 160 A.2d 398 (1960); *Frasso v. City of Reading,* 244 Pa. 525, 90 A. 800 (1914). A trial court might also deny a request for a jury view because the season of the year might not adequately portray the premises at the time of the accident. *Diehm v. New Holland,* 126 Pa.Super. 315, 191 A. 393 (1937).

USX urges that Carrie Works had substantially changed since the date of the accident. In support of this contention, USX cites testimony establishing that the railroad tracks and cars had been removed, the electrical wires running to tower 13D had been cut by vandals, the view occurred in February when there was no vegetation on the path, and the jury had to pass by a Duquesne Light substation, surrounded by fences and barbed wire,

on the way to the view. USX's brief at 29-30. While these facts demonstrate that, on the date of the accident, some conditions were slightly different from conditions on the date of the jury view, the facts are not sufficient to establish substantially changed conditions at the Carrie Works.

The purpose of the view was three-fold: (1) to enable the jury to depict the proximity of the playing field and playground to the Carrie Works; (2) to show the route taken by Carter to gain access to the Carrie Works; and (3) to show the height and structure of the tower. Andrew Carter testified that the conditions at Carrie Works had actually improved since June 1, 1984. The boy indicated that several holes in the fence around the perimeter of the facility had been patched, the wires atop the tower had been removed, and the general condition of the buildings was cleaner. Carter further testified that the property, including the tower, was substantially unchanged since the accident.

As a safeguard against the jury placing too much emphasis upon the view, the trial judge stated to the jury, in pertinent part:

> I omitted one instruction completely and that would be this: The purpose of your trip to a view of the Carrie Furnace Works and Tower 13-D was to enable you to understand the testimony which was or would be introduced.
>
> Conditions which you observed there in 1987 are not substantive evidence of the way the facilities appeared on June 1, 1984, the day of this accident.

> You should consider the testimony and the other evidence, such as pictures, on the conditions as they did exist on June 1, 1984.
>
> There are some and were some differences. Of course, the tower never changed, and the buildings didn't change, but there were some tracks that weren't there. Perhaps other things you might have notices [sic].

Notes of Testimony, pages 718-719. The instruction was very helpful in limiting any prejudice which could result from the view. Accordingly, after consideration of the condition of the premises, the instruction to the jury, and the purpose of the view, we would find that the trial court did not abuse its discretion in permitting the jury to view the scene of the accident.

USX's next allegation not adjudicated by the trial court is that the trial court erred when it failed to grant a continuance of the trial. The trial court is vested with broad discretion in the determination of whether to grant a continuance, and, an appellate court should not disturb the decision absent an abuse of discretion. *Pierce v. Penman*, 357 Pa.Super. 225, ___, 515 A.2d 948, 950 (1986), *alloc. dn.*, 529 A.2d 1082 (1987). "We must carefully scrutinize with extra care the lower court's action in denying a continuance when such action operates to deprive a litigant of his chosen counsel." *Walasavage v. Marinelli*, 334 Pa.Super. 396, 413, 483 A.2d 509, 518 (1984). USX claims that it was prejudiced when a member of its in-house counsel staff was hospitalized prior to trial, and rendered

unable to participate in the trial.[2] We believe the claim has no merit.

Rule 216 of the Pennsylvania Rules of Civil Procedure permits the trial court to grant a continuance to "counsel of record" in case of illness. The attorney who was hospitalized handled a great portion of the pre-trial litigation, but she was not counsel of record nor did she handle the case to the exclusion of all other in-house counsel. Further, the attorney was hospitalized on January 5, 1987, and was unable to return to work, on doctor's orders, for another six weeks. A continuance was granted until February of 1987. Counsel for USX had approximately one month to complete the preparations for trial.[3] USX had the option to try the case with other in-house counsel, or retain outside counsel. On the very same day that the continuance was granted, the well-prepared files were delivered to the offices of the retained counsel. They had adequate time to familiarize themselves thoroughly with the case and present an effective, competent defense. As a result, we do not believe the trial court

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[2] USX cites the rationale expressed in *Budget Laundry Company v. Munter*, 450 Pa. 13, 298 A.2d 55 (1972), as authority for the proposition that a continuance should have been granted. The case is inapposite to the instant matter. In *Budget Laundry Company*, the defendant was *unrepresented* by counsel at trial, due to counsel appearing in Federal Court at the same time as Munter's trial. Here, USX was represented by distinguished counsel at all stages of the Carter lawsuit.

[3] As of January 5, 1987, discovery was virtually complete and USX's pre-trial statement had already been filed with the trial court.

abused its discretion when it granted the continuance until February 2, 1987.[4]

USX alleges, as its final basis for the granting of a new trial, that the trial court erred in permitting Karen Roche, M.D., to speculate as to Andrew Carter's future physical condition. In her report filed with plaintiff's pre-trial statement, Dr. Roche opined that Andrew could develop cataracts and/or neurological degeneration in the future. USX provides us with three cases purportedly in support of its position. None of the cases is dispositive of this issue.

In *Martin v. Johns-Manville Corporation*, 508 Pa. 154, 494 A.2d 1088 (1985), the trial court permitted a medical expert to testify that plaintiff's one blood-spitting episode coupled with his exposure to asbestos, demonstrated a greatly increased risk of contracting cancer. The Pennsylvania Supreme Court held that the trial court had erred when it admitted the testimony for the purpose of demonstrating a greatly increased risk of cancer. In *Lorch v. Eglin*, 369 Pa. 314, 85 A.2d 841 (1952), the plaintiff was injured in an automobile accident. The medical expert witness testified that it was "possible," not reasonably probable, for another illness to develop as a result of his injuries. Once again, the Supreme Court reversed because the evidence was too speculative. In *Baccare v. Mennella*, 346 Pa.Super. 53, 369 A.2d 806 (1976), the plaintiff had

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[4] The trial court would have encountered scheduling difficulties if a longer continuance had been granted. The trial court had the option to insert the case into the March schedule, possible bumping the adjudication of another case into the fall term, or scheduling the trial for the fall.

experienced lower back pain as a result of injuries sustained in an automobile collision. An expert medical witness testified that he was unable to give any prognosis concerning future back pain, or to estimate future medical expenses. This Court affirmed the trial court's conclusion that it could not instruct the jury on future medical expenses when the testimony was so speculative.

A plaintiff in a personal injury suit may introduce expert testimony to support a claim that he may suffer certain future harm as a result of a past injury. *Martin v. Johns-Manville, supra* at 164, 494 A.2d 1093); *Boyle v. Pennsylvania Railroad Company,* 403 Pa. 614, 618, 170 A.a 865, 867 (1961); *Walsh v. Brody,* 220 Pa.Super. 293, 296, 296 A.2d 666, 668 (1971). When making prognosis, a medical expert cannot be expected to express his or her opinion with the same medical certainty required in a causation question. *Boyle v. Pennsylvania R.R., supra, citing Stevenson v. Pennsylvania Sports Enterprises, Inc.,* 372 Pa. 157, 165, 93 A.2d 236, 240 (1952); *see Gradel v. Inouye,* 491 Pa. 534, 421 A.2d 674 (1980). Unlike the plaintiffs in *Martin* and *Lorch,* whose medical experts testified that the illness from which the plaintiffs suffered might possible [sic] lead to other separate illness, Carter was already diagnosed as suffering from neurological degeneration. Dr. Roche stated with reasonable medical probability that neurological degeneration was secondary to severe electrical burns. USX did not pursue this issue on cross-examination, or present expert testimony to rebut the opinion of Dr. Roche. Therefore, we would find that the trial court did not abuse its discretion by permitting the testimony.

We would affirm the portion of the order of the trial court denying USX's motion for judgment n.o.v. and

reverse the portion of the order of the trial court granting a new trial to USX.

McEWEN, J. joins the CONCURRING AND DISSENTING OPINION of OLSZEWSKI, J.

JOHNSON, J. joins the CONCURRING AND DISSENTING OPINION of OLSZEWSKI, J.

APPENDIX C

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

ANDREW CARTER, a minor, by his parent and natural guardian, DONALD CARTER, and DONALD CARTER in his own right,

Plaintiffs,

vs.

UNITED STATES STEEL CORPORATION,

Defendant.

CIVIL DIVISION

No. GD 84-16716

Issue No. 126661

Code: 003

OPINION AND ORDER OF COURT –

NEW TRIAL GRANTED

Filed by ZELEZNIK, J.

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IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

ANDREW CARTER, a minor, by his parent and natural guardian, DONALD CARTER, and DONALD CARTER in his own right,	)	No. GD 84-16716
Plaintiffs,	)	Issue No. 126661
vs.	)	Code: 003
UNITED STATES STEEL CORPORATION	)	
Defendant.	)	

OPINION

ZELEZNIK, J.

This case was argued on a Motion for Post Trial Relief presented by defendant United States Steel Corporation seeking a Judgment Non Obstante Veredicto or a New Trial following a jury verdict in favor of plaintiffs in the amount of $1,200,000., as molded.

The United States Steel Corporation maintained a steel manufacturing plant for approximately three quarters of a century along the easterly bank of the Monongahela River in the Swissvale area. Near this plant, known as the Carrie Furnace Works, in the Borough of Swissvale was a ball field on a hill overlooking the plant works. Behind this ball field was a path leading downhill and through a wooded area to railroad tracks and a narrow road which permitted access along the tracks and into the otherwise fenced-in plant. The minor plaintiff,

Andrew Carter, a 14 year old boy of the community, who played in this ball field, trespassed on the plant property on prior occasions with friends, including Christian Stonebreaker, between Christmas of 1983 and June 1, 1984. During that time period the plant was shut down except for an electric generating plant on the east end. Steel manufacturing had ceased two years earlier and security was limited to roving patrols.

The generating plant produced electricity for the Homestead Works across the river, transmitted through high voltage lines suspended on fabricated steel towers. One of these towers, No. 13D, located in the western part of the plant was the subject of curiosity of these trespassing children during earlier visits to the plant. Tower 13D had open access to its base, where a ladder began at ground level and extended upward 146 feet affording entry to two platforms, one at the 112 foot level and the other at the 135 foot level. Christian Stonebreaker had climbed this tower on an earlier occasion and taunted Andrew Carter and others with attacks on their courage for refusing to climb with him. Andrew Carter did climb other structures including a railroad light tower and catwalks to the top of the idle blast furnace.

On the evening of June 1, 1984, Andrew Carter and his friend entered the plant again. He hesitated to follow his friend up Tower 13D, but did so upon being called "chicken". A view of the surrounding area could be had from the platforms above, and after stopping briefly at the 112 foot platform, they climbed to the higher platform at 135 feet.

This upper platform had railings on two sides and was approximately 15 ft. x 8 ft. in size. After taking in the view from one of the corners bordered by the railing, they decided to venture out on the far edge of the platform without a railing. To accomplish this, they had to duck under four grayish colored uninsulated wires which hung down to within four feet of the platform. Christian Stonebreaker went first, and after passing under the first set of wires heard a crackling sound and turned to see Andrew Carter receive a charge of electricity while touching one of the wires; his left hand was in contact with this wire and electric flashes were discharging from his hand, right shoulder and left foot, until he collapsed. His friend noticed that he was not breathing and attempted to revive him. After a short period of time, Andrew Carter began to breathe again and regained consciousness with some delirium. This friend attempted to yell for help, and then assisted Andrew Carter back down the tower, through the plant and up the hill into the ball field and went on to summon help at his grandmother's house nearby.

Andrew Carter was hospitalized over a period of several months. His left hand and part of his forearm was amputated. The small toe on the left foot was amputated. Part of his right scapula was injured permanently, leaving scars. Numerous operations were required. He attended a rehabilitation center and is currently in a private high school in another state; he possesses an above average I.Q. and is doing very well in academic studies.

The minor plaintiff and his parents filed a Complaint in Civil Action on September 17, 1984, alleging an attractive nuisance as set out in the Restatement of Torts

(Second) @339. Defendant responded with its Answer and defense that the minor plaintiff was a trespasser who understood and assumed the risks involved. The case was listed for trial on January 12, 1987. Defendant had been represented during the development of this case by in-house counsel, particularly a Ms. Debra M. Barnhart. However, she was hospitalized on January 5, 1987, after having attended a pre-trial conciliation immediately prior thereto. Richard F. Lerach, Esq., Senior General Attorney for defendant, attended a deposition later that day and answered the call of the list as scheduled. However, on January 13, 1987, he filed a Motion to Continue because of the illness of Ms. Barnhart as trial counsel. The case was moved back to February 2, 1987 on the same trial list.

Next, the law firm of Buchanan Ingersoll was engaged to represent defendant because of the continued illness of Ms. Barnhart, still recovering from major surgery. The jury was impanelled on February 4, 1987. A Motion to Reconsider the denial of a continuance was denied by the Calendar Control Judge and the case tried to a judge and jury from February 6 through February 12, 1987. The jury deliberated on part of the 12th and 13th, and returned a verdict for the plaintiffs in the amount of $1,500,000.00, later molded to $1,200,000.00 in consideration of comparative negligence assigned to the minor plaintiff. Defendant next filed this Motion for Post Trial Relief.

Although we cannot grant defendant's Motion for Judgment N.O.V., it does appear that a New Trial is warranted. In its argument for a Judgment N.O.V., the defendant contends that the plaintiff's evidence was insufficient to meet their burden of proof under Section

339 of the Restatement of Torts (Second) and that the trial judge erred in refusing to grant a nonsuit or a directed verdict. Specifically, the defendant argues that it owed plaintiff Andrew Carter only the duty of care of a trespasser, that is to refrain from willful or wanton misconduct.

In reviewing a request for Judgment N.O.V., we disregard the moving parties' conflicting evidence and consider only the evidence favorable to the verdict winner. *Acchione v. Acchione,* 376 Pa. 36, 101 A.2d 642 (1954); *Foley v. Clark Equipment Company,* 361 Pa.Super. 599, 523 A.2d 379 (1987). This relief is available only if we are convinced of an injustice so evident that no two persons could fail to agree that the verdict was unjustice. *Acquino v. Bulletin Company,* 190 Pa.Super. 528, 154 A.2d 422 (1959).

There was ample evidence to support each element of the plaintiff's Section 339 claim. There were several pre-accident incidents where the defendant was aware of trespassers on its property. There were broken windows, holes cut in the fence large enough for persons to fit through. There was vandalism in the buildings. The Carrie Works was near a ball field frequented by children of the neighboring community which would be interesting to children. The path was not discouraging to adventurous youths. The plaintiff Andrew Carter and his friends had been in the plant on prior occasions and could have been seen if adequate security was maintained. The fabricated steel tower was situated at the remote end of the idle plant with a ladder providing open access at its base at ground level. There were no warnings on the tower itself. The defendant itself had employed

fail-safe procedures for its own employees when work was needed on that tower. The evidence of the idle blast furnace and vacant condition could convey an inference that the plant was abandoned. Although a minor of Andrew Carter's age might be expected to understand and appreciate the danger of high voltage, and to avoid exposing himself to this hazard, such evidence was not so overwhelming that a compulsory nonsuit or directed verdict should have been granted. The evidence was such as to present a jury question on that issue.

The more important issue is our concern with exposure of members of the jury to outside extraneous information. There was a later electrocution accident occuring on the same property on October 4, 1986. On that date a 16 year old boy was fatally electrocuted on a similar electrical tower in the same Carrie Furnace Works. That boy's name was Orlando Dudley. The jury in the instant case was sent out to deliberate at approximately 2:30 p.m. on Thursday, February 12, 1987. At around 4:30 or 5:00 o'clock, the trial judge communicated with the jury suggesting the option of deliberating further that day until they reach agreement or to go home and resume their deliberations the following morning. The jurors elected to come back the following morning. After instructions not to discuss the case, the jurors reentered the jury room and resumed deliberations somewhere at or before 9:30 a.m. At about that same time, the Court was made aware of a newspaper article that had been published in the Pittsburgh Post-Gazette, East Suburban Edition, on Thursday morning February 12, 1987 and a television news broadcast on Television Station WTAE at 6:00 p.m. Both of these news reports called attention to the similarity of the

Andrew Carter accident and the later Orlando Dudley fatality. These matters were brought to the attention of the trial judge on the morning of the second day of jury deliberation. Both media reports made reference to the later Dudley accident and to the plaintiff's case then in progress.

An in-chambers conference was held with all counsel present at which time the Court determined not to disrupt the deliberations of the jury already in progress on the second day and to await the outcome. The trial judge denied defendant's Motion for a Mistrial at that time. The jury next returned a verdict in favor of the plaintiffs in the amount of $1,500,000. later molded to $1,200,000. in consideration of the percentage of comparative negligence assigned to Andrew Carter.

After the verdict was read and before it was entered, a poll of the jury was taken which revealed that two of the jurors had seen the television broadcast and also had brought it to the attention of other jurors and discussed it during deliberations on Friday. The newspaper article had not been seen nor read by any juror.[1]

The content of the news television is as follows:

> The parents of an electrocuted 16 year-old are suing USX Corporation. Orlando Dudley died October 4th, when he touched a live wire in the Carrie Furnace Mill. The North Braddock boy

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[1] The newspaper account appeared only in the East Suburban Section of the morning newspaper with limited distribution. The television account was aired on the 6:00 p.m. news broadcast when many of the jurors may not have yet reached their homes.

> was searching for copper wire. His parents claim USX was negligent because it did not warn of electrical dangers. They say the company should have posted danger signs after another boy lost a hand and part of his foot in a similar 1984 electrocution there. A lawsuit on that incident is being heard now in Allegheny County Court.

Footage of the accident site as telecast revealing Dudley's body laying dead was run simultaneously with the above script. The jury was then brought back in open Court and dismissed and the verdict entered.

In determining a Motion for a New Trial on this issue, there are two competing policies: (1) a juror may not impeach a verdict after the jury has been discharged; and (2) every litigant has a right to a trial by jury that is impartial and indifferent, based only on evidence carefully brought before it during trial and the law as read to it by the Court. *Commonwealth v. Sero*, 478 Pa. 440, 387 A.2d 63, 67 (1978); see, *Commonwealth v. Santiago*, 456 Pa. 265, 318 A.2d 737 (1974); *Commonwealth v. Pierce*, 453 Pa. 319, 309 A.2d 371 (1973); *Friedman v. Ralph Brothers, Inc.*, 314 Pa. 347, 171 A.900 (1934).

The appellate courts of Pennsylvania have set out a narrow exception to the first policy. A juror may testify after verdict by affidavit or poll as to whether he or she was exposed to information concerning the case gathered from sources outside the courtroom and, if so, what form, substance and extent this extraneous information took. *Pittsburgh National Bank v. Mutual Life Insurance Company*, 493 Pa. 96, 425 A.2d 383 (1981) (post-trial affidavits of jurors are admissible as they go to facts which do not

inhere in the verdict); *Commonwealth v. Sero*, supra. (post-trial sworn deposition of juror was admissible to show fact of jury's exposure to extraneous outside information which, if found to exist, would require a determination to be made as a matter of law whether that information created a potential for prejudice that emasculated the jury's impartiality and indifference, thus warranting a new trial); *Commonwealth v. Zlatovich*, 440 Pa. 388, 269 A.2d 469 ("we permit discharged jurors to testify to the existence of outside influences during their deliberation. . . . "); *Fink v. Commonwealth of Pennsylvania*, 85 Pa.Cmwlth. 290, 482 A.2d 281 (1984) (permitting post-trial testimony of extraneous influences which might have affected [prejudiced] the jury during their deliberations).

This exception is narrowly applied. A Court must restrict its inquiry to whether extraneous outside information came to the attention of the jury and, if so, the form, substance and extent of it. A Court cannot go further and inquire into the *effect* such information had on the deliberative process in general and the mental impressions by which each juror reached his or her decision in particular. Once a Court determines that such information did come to the jury's attention, it must go further and assess the possible prejudice, mindful of the right of all litigants to an impartial and indifferent jury of its peers. See, *Friedman*, supra; *Passarelli v. Shields*, 19 D.& C. 2d 66 (Butler Co., 1958), *affirmed* at 191 Pa.Super.194; 156 A.2d 343 (1959); *U.S. ex rel. Buckhana*, 787 F.2d 230 (7th Cir., 1986) *cf. Fink*, supra (where moving party could not show the existence of alleged prejudicial extraneous information). This is a matter of law for the Court to

determine. Although no hard and fast test exists, former Justice of the Supreme Court of the United States, the Honorable Louis F. Powell, in an attempt to define pornography, stated that it is hard to define what is and what is not pornographic but one knows it when he sees it. Likewise with prejudice. If the Court finds as a matter of law that prejudice resulted from exposure to such information, appropriate relief is warranted.

A Court might give adequate cautionary instructions stressing the jurors' oath of basing their verdict on the facts presented at the trial and the law as presented by the Court. See, *Marshall v. United States,* 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959); *Pratt v. Stein,* 298 Pa.Super. 92, 444 A.2d 674 (1982); *Richardson v. LaBuz,* 85 Pa.Cmwlth. 290, 482 A.2d 281 (1984); *Passarelli,* supra. Or, as suggested in *Commonwealth v. Sero,* if this information creates the potential for prejudice, a new trial should be awarded. See, *Commonwealth v. Santiago,* 456 Pa. 265, 318 A.2d 737 (1974) (where a prospective witness for the prosecution remarked to an alternate juror just before the jury was sworn that the defendant had killed before; this juror relayed that incident to the court tipstaff in the presence of other jurors. It was held to be reversible error not to grant defendant's Motion for a Mistrial since the information was, beyond speculation, highly prejudicial notwithstanding cautionary instructions and assurances from the affected jurors that they could remain impartial). See also, *Wilshire v. Bruaw,* 331 Pa. 392, 200 A. 67 (1938).

In matters civil in nature the mere suggestion of prejudice is not sufficient to warrant the grant of a new trial. See, *Pittsburgh National Bank,* supra.; *Friedman,* supra.; *Krywucki v. Trommer,* 199 Pa.Super. 145, 184 A.2d

389 (1962); *Passarelli*, supra.; and, *Kimmel v. Spector Motor Service, Inc.*, 34 Erie Co. L.J. 216 (Erie Co., 1940). But it is not only in instances of jury tampering by inadvertent or intentional third person actions that courts have considered the prejudicial effect of extraneous information on juries. Where media information is the vehicle by which such information reaches a jury, we consider its nature, content and extent and, where highly prejudicial, award a new trial. If the publication is determined to be of a very damaging character, a new trial is warranted. *Wilson v. Consolidated Dressed Beef Company*, 295 Pa. 168, 145 A. 81 (1929). Reviewing the instant record, we believe it was necessary to poll the jurors individually as to any exposure to the outside newspaper and television reports and, once discovered that this occurred, evaluate the extent. Two of the jurors, Numbers 5 and 8, had seen the television broadcast and had discussed it with other jurors during deliberation. It then became our obligation to make a determination of whether this was prejudicial. The plaintiffs counterargues [sic] that this extraneous information cannot be considered because it was not "improperly" brought to the jury's attention by the efforts of some tampering party, third person or other surreptitious yet nonetheless culpable means. Plaintiffs cite principles of law in the Federal Rules of Evidence Number 606(b) and its construction by the Seventh Circuit Court of Appeals in *U.S. ex rel. Buckhana v. Lane*, supra. In construing that exception, the *Buckhana* Court stated that the "intent of Rule 606(b) is to prohibit the questioning of jurors regarding the *effect* of extraneous information such as newspapers, television or other media or personal contact directly concerning the guilt or

innocense [sic] of the defendant on trial, on the deliberations of the jurors." However, *Buckhana* does not so narrowly construe the word "improper" to mean only jury tampering. It suggests that extraneous information from the media that comes to a jury's attention may also be improper. It limits inquiry only to determining the existence of this information, not its effects. It holds that the information which comes to a jury's attention must be something that goes to the guilt or innocense [sic] of a criminal defendant and not innocuous housekeeping matters before Rule 606 becomes applicable. Here extraneous information had come to the jury's attention and, once established by two of them that this was true and that the reports had been discussed with other jurors, it became necessary to determine whether that information in itself was prejudicial.

Although the plaintiff argues that, even assuming the propriety of the inquiry, that the news broadcast was factually accurate, brief, innocuous and unrelated to the issues in the instant case, we believe that the admission of any evidence of the subsequent accident was inappropriate. The identical matter was presented in defendant's Motion in Limine which was granted prohibiting any testimony or other evidence concerning the later Dudley case. The jury was not permitted to know of a subsequent accident not admissible in evidence. The content of the newscast, that a teenage boy of 16 entered the same plant, climbed a similar electrical tower and was fatally electrocuted by a similar uninsulated wire while standing upon a similar platform commencing to salvage copper wire with a hacksaw, and thereafter citing the lack of safety precautions by the defendant even after a similar accident

had occurred (the instant Carter case) raises an immediate adverse inference as to defendant's contempt for the lives of trespassing children. Plaintiff's counsel, in his closing argument, had emphasized the broader aspects of the issue as a community issue of whether the defendant's apparent lack of concern should go unpunished.

Having determined that this extraneous information did reach the jury and that it was prejudicial, we believe that a new trial is warranted. The jury had been given only normal cautionary instructions in the nature of an admonition against discussing the case with others or having others approach them prior to reaching the deliberation room on the following morning and how they must base their verdict solely on the evidence admitted to trial and the law as given by the trial judge. We believe this television broadcast to be of such a damaging nature that this ordinary instruction would not overcome the prejudicial effect.

The plaintiff further argues that the defendant assumed the risk of this extraneous information reaching the jury since the defendant's public affairs department had been contacted for information concerning the earlier report of the Dudley accident some several months prior to this trial, and had failed to request adequate cautionary instructions or sequestration. We do not believe such inquiry several months earlier would alert the defendant to the possibility of a television news report while this jury was in deliberation.

Our determination being dispositive, the remaining exceptions argued by the defendant will not be addressed.

An Order will issue denying defendant's Motion for a Judgment N.O.V. and granting a New Trial on liability and damages.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

ANDREW CARTER, a minor, by his parent and natural guardian, DONALD CARTER, and DONALD CARTER in his own right, Plaintiffs, vs. UNITED STATES STEEL CORPORATION, Defendant.	CIVIL DIVISION No. GD 84-16716 Issue No.: 126661 Code: 003

ORDER

AND NOW, to-wit, this 30th day of October, 1987, after oral argument, consideration of briefs involved and review and analysis of the proceedings and events affecting the case, defendant's Motion for a Judgment N.O.V. is dismissed and defendant's Motion for a New Trial is granted on both liability and damages.

BY THE COURT:

/s/ Zeleznik J. J.

APPENDIX D

[LOGO]

The Supreme Court of Pennsylvania

Western District

CHARLES W. JOHNS, ESQUIRE
PROTHONOTARY

IRMA T. GARDNER
DEPUTY PROTHONOTARY

801 CITY-COUNTY BUILDING
PITTSBURGH, PA.
15219-2463
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April 9, 1992

C. Richter Taylor, Jr., Esquire
Joy Gobos McNally, Esquire
MANSMANN, CINDRICH & TITUS
20th Floor, Four Gateway Center
Pittsburgh, PA 15222

In Re: *Andrew Carter, a minor, by his Parent and Natural Guardian, Donald Carter, and Donald Carter, in his own right v. United States Steel Corporation*
No. 46. W. D. Appeal Docket 1990

Dear Mr. Taylor and Ms. McNally:

The Court has entered the following Order on your Application for Reargument in the above-captioned matter:

"April 9, 1992
Application for
Reargument Denied
Per Curiam"

Very truly yours,

/s/ Irma T. Gardner
DEPUTY PROTHONOTARY

ITG:cs
cc: Edward J. Balzarini, Esquire
Hon. Richard G. Zeleznik

APPENDIX E

IN THE
SUPREME COURT OF PENNSYLVANIA

Sitting in Pittsburgh

ANDREW CARTER, A MINOR, BY HIS PARENT and NATURAL GUARDIAN, DONALD CARTER, and DONALD CARTER In His Own Right, Appellants v. UNITED STATES STEEL CORPORATION Appellee	No. 46 W.D. Appeal Docket 1990

APPLICATION FOR REARGUMENT

APPLICATION FOR REARGUMENT OF THE ORDER OF THE SUPREME COURT OF PENNSYLVANIA ENTERED ON MARCH 6, 1992 AT NO. 46 W.D. APPEAL DOCKET 1990 WHICH REVERSED THE ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA ENTERED ON JANUARY 4, 1990 AT NO. 1652 PITTSBURGH 1987 AFFIRMING THE ORDER OF THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA, ENTERED ON NOVEMBER 2, 1987 AT NO. G.D. 84-16716

C. Richter Taylor, Jr.
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Attorneys for Appellee
United States Steel Corporation

IN THE
SUPREME COURT OF PENNSYLVANIA
Sitting in Pittsburgh

ANDREW CARTER, A MINOR, BY HIS PARENT and NATURAL GUARDIAN, DONALD CARTER, and DONALD CARTER In His Own Right,	)	No. 46 W.D. Appeal Docket 1990
Appellants	)	
v.	)	
UNITED STATES STEEL CORPORATION	)	
Appellee	)	

APPLICATION FOR REARGUMENT

United States Steel Corporation ("USX") respectfully requests pursuant to Rule 2543 of the Pennsylvania Rules of Appellate Procedure that this Court allow reargument of its Order entered on March 6, 1992 reversing the Order of the Superior Court of Pennsylvania affirming the grant of a new trial to USX. As grounds, USX states the following:

REASONS FOR REARGUMENT

This Application for Reargument is filed in the context of a case brought against USX by plaintiff Donald Carter in his own right, and as the parent and natural guardian of plaintiff, Andrew Carter, a minor ("Carter"). Plaintiffs sued USX on a theory of negligence under Section 339 of the Restatement (Second) of Torts to recover for the injuries Carter sustained to his arm and

foot while trespassing with his friend, Chris Stonebraker, on a large electrical transmission tower at USX's Carrie Furnace Works (the "Carrie Furnace") on June 1, 1984.

Trial commenced on February 6, 1987. Under USX's Motion in Limine which was granted by the trial court, the jury was not permitted to hear anything about accidents that occurred at the Carrie Furnace subsequent to the Carter accident.

The case was submitted on February 12, 1987. During deliberations, the jury received information through a television broadcast about the electrocution of another youth on a tower at the Carrie Furnace and the claim of negligence his parents had brought against USX.[1] The broadcast also mentioned that another boy had lost a hand and part of his foot at the Carrie Furnace in a similar 1984 accident, and that a lawsuit based on this incident was being heard. This was an unmistakeable [sic] reference to the Carter trial.

Upon post-trial review, the trial court determined that the jury had been exposed to extraneous influences of a prejudicial nature. Accordingly, the trial court granted USX a new trial. (Appendix 4) The Pennsylvania Superior Court En Banc affirmed the trial court's grant of a new trial. (Appendix 2) However, this Court reversed

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[1] On February 12, 1987, Channel 4 ("WTAE-TV") broadcast a story during its 6:00 P.M. news program about a fatal accident which occurred subsequent to the Carter accident. The broadcast showed people climbing a tower at the Carrie Furnace, a dead body on an elevated platform, and ambulances around the base of the tower.

the Superior Court's affirmance of the grant of a new trial. (Appendix 1) USX seeks reargument of this Order.

In its Opinion Announcing the Judgment of the Court (the "Opinion") this Court essentially makes three key points by holding (a) that the newscast was not prejudicial, (b) that USX waived certain rights regarding its motion for a mistrial and (c) that USX is estopped to argue prejudicial publicity because its own public relations department supplied the information that became part of the crucial news account. In all three instances the Court has disregarded the clear findings and conclusions of the trial court and has substituted its own impressions as to what is fair and reasonable, thereby ignoring long-standing principles applicable to appellate review of rulings such as those rendered by the trial court in the case at hand. The end result is an analysis that turns legal precedent inside out and that produces a result through gross distortion that could not be achieved in any other manner.

PREJUDICE

In its Opinion for the first time, this Court delineates the criteria a trial judge should consider in determining whether a jury's exposure to extraneous influences during deliberations are so prejudicial as to warrant a new trial. Specifically, this Court states that a trial judge should decide whether there is a "reasonable likelihood of prejudice" by considering "1) whether the extraneous influence relates to a central issue in the case or merely involves a collateral issue; 2) whether the extraneous influence provided the jury with information they did not

have before them at trial; and 3) whether the extraneous influence was emotional or inflammatory in nature." (Appendix 1 at page 13)

This Court then applies these pronouncements against the applicable facts and reaches a conclusion that is diametrically opposed to that reached by the trial judge before whom this case was tried, ruling that there was not a reasonable likelihood of prejudice from the broadcast to which the jury had been exposed. (Appendix 1, at pages 12-16) Consequently, this Court reversed the trial court's grant of a new trial. However, in doing so, this Court disregarded precedent and violated a number of its own long-standing principles of law.

As this Court has recognized, the grant of a new trial is an inherent and immemorial right of a trial judge that is not easily disturbed. *Mozino v. Caruso,* 284 Pa. 220, 120 A.2d 300, 301 (1956). For many years in Pennsylvania the question of whether extraneous influences to which a jury was exposed were prejudicial so as to merit judicial action is answered by a trial judge through the exercise of broad discretion.[2]

A conclusion reached by a trial court after an exercise of discretion can be overturned on appeal only if an

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[2] *Wilson v. Consolidated Dressed Beef Co.,* 295 Pa. 168, 145 A. 81 (1929) (It was within the trial judge's discretion to determine whether jurors, who had read a newspaper article about the trial, should have been withdrawn.) *Accord Kirby v. Rossell,* 133 Ariz. 42, 648 P.2d 1048 (1982) and *Maryland Deposit Ins. Fund Corp. v. Billman,* 321 Md. 3, 580 A.2d 1044 (1990), *cited with approval and followed in this Court's opinion,* Appendix 1 at page 13, f.n.6.

abuse of discretionary power is shown. *In re: Garrett's Estate,* 335 Pa. 287, 6 A.2d 858, 860 (1939). Such an abuse involves not merely an error in judgment, but occurs where the law is overriden [sic] or misapplied or the judgment is manifestly unreasonable, or is the result of partiality, prejudice, bias or ill will. *Id.* Most significantly, to override a trial court's exercise of discretion, "it is not sufficient to persuade the appellate court that it might have reached a different conclusion . . . " *Id.*

Applying these standards, it is clear beyond doubt that the trial judge reached the right conclusion in finding that the broadcast was prejudicial. Certainly, his findings cannot now be viewed under any reasonable application of the law as an abuse of discretion. The suit brought by Carter against USX was based upon negligence, with allegations about USX's failure to exercise due care. The broadcast to which the jury was exposed stated that Orlando Dudley's parents claimed that "USX was negligent and did not warn of electrical dangers". Clearly, the Court's first criteria – a relationship to a central issue in the case – was satisfied. Second, the broadcast provided the jury with information about precisely that which the jury was not permitted to hear, another incident of trespassing and/or injury at the Carrie Furnace which occurred after Carter's June 1, 1984 accident.[3] Finally, if a

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[3] The Court attempts to negate this point by observing that the jurors learned nothing new insofar as they had become aware of a lack of safety precautions through a view of the premises. (Appendix 1 at page 15) This misses the point. The view, although it might have suggested certain things about the premises, did not reveal to the jury that another person had

(Continued on following page)

broadcast to these jurors in this case that described and showed images connected to the electrocution of a sixteen year-old boy, said to be due to USX's alleged negligence and failures to warn, and which mentioned that at the same location another boy on USX property had lost a hand and part of his foot is not inflammatory or emotional, it is difficult to imagine circumstances which this Court's standard of prejudice can ever be met.[4]

Thus, although the trial judge did not have the benefit of the Court's criteria when evaluating the broadcast, his conclusion that the broadcast was prejudicial is consistent with those criteria and satisfies the "reasonable likelihood of prejudice" standard. It simply cannot be stated that the trial judge's conclusion was an abuse of discretion as defined by this Court. It was not "manifestly unreasonable" and there is no indication whatsoever that it was the result of "partiality, prejudice, bias or ill-will." *In re: Garrett's Estate,* 335 Pa. at 287, 6 A.2d at 860. In reversing the trial judge, this Court improperly substituted its judgment for his. While this Court may judge the broadcast differently and find it devoid of prejudice, Pennsylvania law commands that the trial court's determination that it was prejudicial, which represents a proper exercise of discretion, must stand. The denial of a

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(Continued from previous page)

been killed at the scene after the Carter accident. That information came solely from the broadcast.

[4] As an example of the emotional impact the information in the broadcast had, during the exchange between judge and jurors, Juror No. 1 asked spontaneously whether the boy who was electrocuted was Carter's friend, Chris Stonebacker. (R. 45a)

new trial to USX is legally and fundamentally wrong and deprives USX of that same fundamental right to a fair trial as is afforded to every ordinary citizen of this Commonwealth.

REMAND AS ALTERNATIVE

Where injustice open and obvious fails to serve as the basis for an affirmance, there is an alternative approach that *must* be considered under these facts. Issues of prejudice and those related to an award of a new trial, which lie squarely within the province of the trial court, should be remanded to the trial judge who heard the case from beginning to end, with instructions to re-determine them according to the standard and criteria this Court has just now pronounced.

WAIVER

A reargument would also serve to correct certain other misunderstandings or misinterpretations applied by this Court. For example, according to the Court, the interaction between the trial judge and USX's counsel when these matters were discussed supposedly works a waiver which estops USX from legitimately complaining about the prejudicial effect of the broadcast. Specifically, counsel for USX is castigated for acquiescing in the trial judge's decision to allow the jury to proceed with deliberations. (Appendix 1 at pages 16-17) In point of fact, this decision was elicited by and rendered in response to USX's counsel's request for an immediate polling. Once the trial judge denied counsel's request and announced the procedure he was going to follow, what other action

within reason, propriety and the law was counsel for USX supposed to take? The Pennsylvania Rules of Civil Procedure have long since eliminated any need for counsel to file an exception under such circumstances. Pa. R. Civ. P. 227.

A strained waiver argument is also made out of an erroneous interpretation of exchanges between the judge and counsel regarding USX's motion for a mistrial, which allegedly resulted in an estoppel. (Appendix 1 at pages 4, 16-17.) By way of clarification, after the trial judge denied the request for an immediate polling, USX's counsel then moved orally for a mistrial. (R. 36a) Inasmuch as the trial court had indicated its decision to allow the jury to proceed with the deliberations, the trial judge denied the mistrial. At that point, USX's counsel stated that he would reduce the motion for mistrial to writing and supplement it with copies of the publicity. (R. 36a-38a) The trial court agreed with counsel's intention to submit a written motion, and noted that the motion would become moot if a defense verdict were rendered. (R. 39a) USX's counsel responded to the judge's suggestion by acknowledging that he would at that future point in time withdraw the motion if in fact the jury ultimately found in USX's favor. (R. 39a) The exchange in this regard between the judge and counsel went as follows:

> THE COURT: Maybe no one read it [the article] at all. Maybe you will get a defense verdict, then it becomes moot.
>
> [COUNSEL FOR USX]: In that event [if the jury finds in USX's favor], I will [in the future] withdraw my motion.

Who can best interpret the meaning of the words spoken or the presence or absence on counsel's part of an intention to withdraw an oral motion previously filed? As the Court well knows, that task must fall to the trial judge who was present personally and heard the words spoken. If there is doubt that the trial judge considered this issue, then the remedy is remand not a stilted and unfounded sorting of words to force a result that is not substantiated either by the record or reality.[5] If there is a legitimate doubt, which we would vehemently dispute, the matter is for the trial court to resolve.

ESTOPPEL

Similarly, to conclude as this Court did, that USX generated and is responsible for the broadcast that influenced the jury exceeds the bounds of reason and right. (Appendix 4, page 16) A newspaper reporter contacted a USX representative. He spoke to her briefly about the Dudley and Carter incidents. The use of these mere facts to estop USX from taking issue with a tainted verdict

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[5] It is curious that counsel for plaintiff never raised the waiver or estoppel argument either in its Objections and Response to Defendant's Motion for Mistrial (the "Response") or in its Brief in Opposition to Defendant's Motion for Post-Trial Relief. If close proximity to these key discussions failed to produce the argument which now seems so convincing to plaintiff, and to this Court, how can the trial judge be faulted for failing to consider it? Knowing that a claim of waiver and estoppel would be dismissed by the trial court in short order, plaintiff's counsel took a different tack immediately following trial by arguing that defense counsel never, during deliberations or subsequent to deliberation, moved that the jury be polled. (R. 562a).

amounts to an impermissible denial of due process. USX is no more deserving of punishment in this regard than is the trial judge, who also spoke to the reporter. Further, the conversation between the reporter and the USX representative generated the newspaper article which the jury apparently did not see. There is no evidence that that conversation precipitated the broadcast which was in fact the publicity that tainted the jury.

That the trial court considered this argument, recognized it in the context of the case as being totally inappropriate, and in the exercise of its discretion dispensed with it in short order cannot be disregarded. (Appendix 4 at page 14) However, if this Court now feels that there are additional factors that the trial court should have considered but did not, the remedy is a remand not a unilateral dismantling of the trial court's finding on this point. Otherwise, the trial court's finding must be affirmed insofar as it represents a proper exercise of discretion.

CONCLUSION

USX respectfully applies for a reargument from this Court's Order. For all of the foregoing reasons, reargument should be granted.

Respectfully submitted,

/s/ Charles R. Taylor
Charles R. Taylor
Joy Gobos McNally

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APPENDIX F

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

ANDREW CARTER, a minor, by his parent and natural guardian, DONALD CARTER, and DONALD CARTER in his own right,	)	No. G.D. 84-16716
Plaintiffs,	)	Issue No. 126661
v.	)	
UNITED STATES STEEL CORPORATION,	)	
Defendant.	)	

MOTION OF UNITED STATES STEEL CORPORATION FOR POST-TRIAL RELIEF PURSUANT TO PA. R. CIV. P. 227.1

* * *

5. The Court should grant a new trial for Defendant as the Court erred as a matter of law in refusing to poll the jury and grant Defendant's requested Motion for Mistrial made orally at approximately 9:30 a.m. on Friday, February 13, 1987. Defendant appropriately raised the ground for this Motion for a New Trial by making a Motion for Mistrial immediately upon its becoming aware that on February 12, 1987, the *Pittsburgh Post-Gazette,* in its East Suburban Edition, printed an article referring to the instant action and indicating that this case was "similar" to a subsequent accident on October 4, 1986, at which time a 16 year old died when he contacted a live wire at the top of a tower similar to the one

involved in the instant case. Specifically, the article, a copy of which is attached hereto as Exhibit "A" and made a part hereof by reference, stated that the Complaint in the subsequent action alleged, "USX was negligent in not posting 'Danger' signs at [the Carrie Furnace Mill]. In the Complaint, the Dudley's charge that, 'USX knew the wires were dangerous because of the Carter electrocution at the mill in 1984.' " The article stated that the cases were similar and referred to the fact that the present case was being tried before Judge Zeleznik. A substantially identical report comparing the two cases and terming them "similar" was aired on WTAE, Channel 4, in Pittsburgh on the 6:00 p.m. news on February 12, 1987, along with pictures showing a similar tower, people climbing the tower, and ambulances around the base of the tower. A copy of the transcript of that broadcast is attached hereto as Exhibit "B" and made a part hereof by reference. A tape of the broadcast has been made a part of the record by being filed with Defendant's Motion for Mistrial. The article and the broadcast were subsequent to an article on the Dudley case alone published in *The Pittsburgh Press* on January 29, 1987, a copy of which article is attached hereto as Exhibit "C" and made a part hereof by reference.

As reflected in the polling of the jury conducted in chambers following receipt of the verdict, three members of the jury, jurors 4, 8 and 10, testified that they changed their vote so as to vote in favor of Plaintiff following a discussion of the article and broadcast during jury deliberations. One juror, juror 9, testified that she maintained her vote for Defendant throughout the deliberations. Attached hereto as Exhibit "D" and made a part hereof by

reference are those pages of the transcript of the in-chambers interrogation of the jurors, wherein they indicated their change of position. The article and broadcast were clearly prejudicial because they showed subsequent accidents on the property and on the tower and stated that the two cases were "similar." This Court had granted Defendant's Motion In Limine to exclude evidence of subsequent accidents because it would be clearly prejudicial. In fact, in chambers prior to trial, Plaintiff's counsel indicated that he believed reference to subsequent accidents would indeed be prejudicial and he would refrain from referring to them. The entire jury was, therefore, influenced by external forces, their deliberations were tainted, and a new trial should be granted.

6. The Court should grant a new trial for Defendant as the Court erred as a matter of law in granting Plaintiffs' Motion for a View of the Premises. Defendant appropriately raised the ground for this Motion for a New Trial by objecting to a view of the site. Both counsel had access to approximately 140 pictures depicting the site soon after the accident, the trial was held some $2^1/_2$ years following the accident, conditions around the site had substantially changed, and the jury was allowed to see what remedial actions had or had not been taken. The severe prejudice resulting from the view was clear because as reported in an article published in the *Pittsburgh Post-Gazette* on Saturday, February 14, 1987, the jurors placed great emphasis on their belief, obtained through the view, that, "USX Corp. has not tried to prevent similar accidents." A copy of that article is attached hereto as Exhibit "E" and made a part hereof by reference. Both alone and in combination, the view, and the subsequent article and news broadcast made a fair trial for Defendant impossible.

* * *

APPENDIX G

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

ANDREW CARTER, a minor, by his parent and natural guardian, DONALD CARTER, and DONALD CARTER, in his own right, Plaintiffs, v. UNITED STATES STEEL CORPORATION, Defendant.	CIVIL DIVISION No. G.D. 84-16716 Issue No. 126661 Code: 003 **MOTION FOR MISTRIAL** Filed on Behalf of Defendant, United States Steel Corporation Counsel of Record For This Party: C. Richter Taylor, Jr., Esquire Pa. I.D. #01395 (412) 562-1022 Stanley Yorsz, Esquire Pa. I.D. #28979 (412) 562-8841 Deborah A. Hammitt, Esquire Pa. I.D. #44758 (412) 562-3923

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MOTION FOR MISTRIAL

Defendant United States Steel Corporation ("USS"), by its undersigned counsel, hereby moves for a mistrial as follows:

1. This action arises out of an incident on June 1, 1984, when the minor Plaintiff, while trespassing on the private property of USS, climbed a 146-foot high electrical transmission tower and came into contact with a live wire, sustaining non-fatal injuries.

2. On January 29, 1987, the newspaper article attached hereto as Exhibit A was featured in the Pittsburgh Press, final edition. That article indicated that a Complaint had been filed in which USX was sued as a result of the death of Orlando Dudley in October of 1986. According to the article, Dudley died when he was electrocuted while climbing a tower at the Carrie Furnace facility.

3. The jury was selected in the instant case on February 4, 1987.

4. Trial began on February 6, 1987.

5. Defendant rested, and the case went to the jury for their consideration on February 12, 1987, late in the afternoon.

6. On February 12, 1987, the East Suburban Edition of the Pittsburgh Post-Gazette ran the news article attached hereto as Exhibit B. That article again related the filing of the Complaint in the Orlando Dudley matter, but this time indicated that it was "similar" to the instant action.

7. Also on February 12, 1987, Pittsburgh television Channel 4, WTAE, broadcast on the 6:00 p.m. news program the story the script of which is attached hereto as Exhibit C. The broadcast again termed the Orlando Dudley incident and the instant action as "similar". The story was broadcast from just outside the Carrie Furnace Works, where the accident which is the subject of this litigation took place. Defense counsel has a videotape of the broadcast which they will make available to Plaintiffs' counsel, and which is being filed with the Court concurrently with this Motion.

8. The February 12, 1987 article and broadcast were severely prejudicial to Defendant because they both tied together the subsequent Orlando Dudley incident and the instant action at the same facility and gave the impression, *inter alia,* that Defendant had taken no steps to prevent subsequent accidents. In fact, this Court granted Defendant's Motion in Limine to *exclude* testimony of subsequent accidents because of the obvious and clear prejudice.

9. On the morning of February 13, 1987, at approximately 9:30, immediately upon counsel becoming aware

of the above article and broadcast, defense counsel orally moved for a polling of the jury and for a mistrial due to the above-mentioned newspaper articles and news broadcast and their prejudicial effect.

10. The Honorable Richard G. Zeleznik denied Defendant's oral motion for a mistrial, refused to poll the jury and indicated that the jury would be polled following the verdict.

11. Counsel for Defendant indicated that they would reduce the Motion for Mistrial to writing and attach to it the pertinent news articles and broadcast script.

WHEREFORE, Defendant United States Steel Corporation hereby renews its Motion for Mistrial.

Dated: February 20, 1987

Respectfully Submitted,

/s/ C. Richter Taylor Jr.
C. Richter Taylor, Jr.

/s/ Stanley Yorsz
Stanley Yorsz

/s/ Deborah A. Hammitt
Deborah A. Hammitt

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Counsel for Defendant

APPENDIX H

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

ANDREW CARTER, a minor, by his parent and natural guardian, DONALD CARTER, and DONALD CARTER, in his own right,

Plaintiffs,

v.

UNITED STATES STEEL CORPORATION,

Defendant.

CIVIL DIVISION

No. G.D. 84-16716

Issue No. 126661

Code: 003

MOTION IN LIMINE

Filed on Behalf of Defendant, United States Steel Corporation

Counsel of Record For This Party:

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MOTION IN LIMINE

Defendant United States Steel Corporation ("USS"), by its undersigned counsel, moves In Limine for an Order of Court precluding Plaintiffs from introducing any evidence and/or commenting upon any of the following matters during the trial, the opening statement or closing argument or any other phase of this case:

1. This action arises out of an incident on June 1, 1984, when the minor Plaintiff, while trespassing on the property of USS, climbed a 146-foot high electrical transmission tower and came into contact with a live wire, sustaining non-fatal injuries ("the Accident").

2. Precautionary or remedial safety measures recommended to and/or undertaken by USS subsequent to the Accident in an attempt to prevent a recurrence thereof are irrelevant and prejudicial to the issue of USS's alleged antecedent negligence or recklessness, and any evidence thereof should be excluded.

3. Likewise, later instances of trespassing and/or injury on USS property and/or on any electrical tower on USS property are irrelevant and prejudicial to the issue of

USS's alleged antecedent negligence or recklessness, and any evidence thereof should be excluded.

* * *

WHEREFORE, USS respectfully requests that this Honorable Court grant this Motion In Limine and preclude Plaintiffs from introducing evidence or making comment upon the above subjects during trial and/or the opening statement or closing arguments of this case.

Dated:

Respectfully Submitted,

/s/ C. Richter Taylor Jr.
C. Richter Taylor, Jr.

/s/ Stanley Yorsz
Stanley Yorsz

/s/ Deborah A. Hammitt
Deborah A. Hammitt

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Counsel for Defendant, United States Steel Corporation

APPENDIX I

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

ANDREW CARTER, a minor, by his parent and natural guardian, DONALD CARTER, and DONALD CARTER in his own right,	)	
Plaintiffs,	)	No. G.D. 84-16716
v.	)	
UNITED STATES STEEL CORPORATION,	)	
Defendant.	)	

ORDER OF COURT

AND NOW, to-wit, this 10th day of February, 1987, it is hereby ORDERED, ADJUDGED and DECREED the [sic] the Motion in Limine presented by Defendant United States Steel Corporation ("USS") is granted and that plaintiffs are precluded from introducing any evidence and/or commenting upon the same during trial and/or arguments of this case with respect to the following:

1. Precautionary or remedial measures recommended and/or undertaken by USS with respect to tower and/or plant security subsequent to June 1, 1984; and

2. Instances of trespassing and/or injury on USS property and/or on a USS electrical tower subsequent to June 1, 1984; and

* * *

BY THE COURT:

/s/ Zeleznik

J.

APPENDIX J

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

ANDREW CARTER, a minor, by his parent and natural guardian Donald Carter, and Donald Carter in his own right,

Plaintiffs,

VS.

UNITED STATES STEEL CORPORATION,

Defendant.

CIVIL DIVISION

NO. GD 84-16716

Jury Verdict and In-Chambers Proceedings

Filed By:
Susan R. Deramo
Official Court Reporter

Hearing Date:
February 13, 1987

Hearing Judge:
Hon. Richard G. Zeleznik

COUNSEL OF RECORD:

For the Plaintiffs:
Edward J. Balzarini, Esq.
3303 Grant Building
Pittsburgh, PA 15219

For the Defendant:
C. Richter Taylor, Esq.
-and-
Stanley Yorsz, Esq.

[p. 2] February 13, 1987.

(In Chambers.)

THE COURT: We are in chambers on the morning of February the 13th, 1987. One of the attorneys from Defendant's firm is over here and has showed me a

newspaper articl [sic] that appeared on February the 12th in the mornind [sic] edition of the PG East. It refers to this case and another case subsequently filed, filed last month and referring to this case filed earlier.

Of course, Defendants now have some matters they would like the judge to consider, for the Court to consider.

MR. TAYLOR: Yes, Your Honor. I should also add that there was a Channel 4 news matter that came on last night. I did not see that, but from what I understand, it came on at six o'clock, on the six o'clock news, that there was videotaping done of the Carrie Furnace and there was a comparison between this case and the prior case.

I also know that at the time of jury selection, there was another article that we should probably bring to your attention that came out – that it came out on Thursday, January 29, 1987, in the final edition of the Press, I think.

[p. 3] Stan, is that correct?

MR. YORSZ: Yes.

MR. TAYLOR: I'm pretty sure it was the press.

MR. YORSZ: Yes.

MR. TAYLOR: It is the Pittsburgh Press, Your Honor, for sure.

THE COURT: I don't see where it refers to our case.

MR. TAYLOR: It doesn't. It refers only to the second case, which was Orlanda Dudley. So, at this point,

we have been pondering and trying to figure out what to do so far as the present circumstances are concerned.

I understand that yesterday evening the jury was dismissed and that at that time they had deliberated for about a half an hour.

MR. BALZARINI: I would disagree with that. At the time the jury was dismissed –

THE COURT: The jury went out at 3:10 and I sent a note up inquiring and I have given you a copy. I don't think I gave Mr. Balzarini a copy.

MR. BALZARINI: I didn't realize there had been a discussion regarding a note.

THE COURT: Well, I did that and you can [p. 4] look at that. The original is going to be on file.

MR. TAYLOR: Just so the record is clear, we went to –

MR. BALZARINI: Let's go back to when the jury was dismissed. Was there any discussion about whether or not they had proceeded to deliberate on this case? Had they begun deliberation?

THE COURT: They had begun deliberation.

MR. BALZARINI: All right.

THE COURT: They had been deliberating for about an hour after eating their lunch, as best as I can tell.

That's for you, Mr. Balzarini. He has a copy. I want you to keep that because I'm filing the original.

MR. BALZARINI: Thank you, Your Honor.

MR. TAYLOR: So that I guess we're to the point of trying to determine what we should do with this jury so far as this case is concerned.

I had the General Counsel from U.S. Steel come down this morning. We were talking at the time Debra Hammet came over and brought the newspaper article to you. And I guess the consensus of all attorneys on our side of the case that talked about it is that we just simply have to find [p. 5] out. I mean, the article is so prejudicial to us that we have to find out whether any member of the jury was aware of it and read it.

* * *

And my recommendation would be that we take a poll of the entire jury and say are they aware of any articles about the Andrew Carter case that appeared in the paper, because it does discuss our case. I think it would be disastrous if we asked them whether there was any articles about Carrie Furnace, because they'll want to find out which article it is and they'll assume there's another incident out there.

I think it is innocuous enough to say whether they had heard anything or read anything about articles in the paper about this particular case, the Andrew Carter case.

I have not looked at the law, obviously. We did consult with John McLean as to – he's an [p. 6] ex-judge over here – as to what he would have done under the circumstances or would recommend that we do, and that was basically his recommendation.

Of course, we have the danger that if somebody raises his hand and we bring them into the courtroom

and talk to them about the article and we ask them whether they have discussed it with the other members of the jury that that person is going to say no. And I think we have the right, following the delivery of the verdict to determine whether in fact that person has made a correct representation to us that they have not discussed this case with the jury. And I would ask, after the verdict is delivered, to bring the jurors in and ask them directly whether they were aware or whether they have been told or whether this juror had brought it to their attention this particular article.

That would be the procedure that we would recommend be followed in the case. As I say, I have not researched the law.

MR. BALZARINI: Your Honor, I have not had an opportunity to research the law, either. This matter was called to my attention by Counsel for Defendant this morning shortly before nine and we immediately came over to see the Court regarding [p. 7] the matter.

Without an opportunity to research the law, my recollection of the applicable law is that a jury, once it commences deliberations, cannot be interrupted with an interrogation. And to ask a jury to answer questions after they have deliberated and rendered a verdict on a series of interrogatories or any one of those interrogatories would be an effort to impeach their own verdict.

I am remembering a criminal case in which the Supreme Court of Pennsylvania spoke where after the verdict it was attempted to be shown that as a matter of fact affadvits were obtained, that members of the jury

had read a newspaper article regarding the matter in question and it was prejudicial.

I believe the decision of the Court was that a jury cannot impeach its own verdict.

* * *

[p. 9] To cover the other aspect of Plaintiff's posturing on this matter, I confronted Mr. and Mrs. Carter and their son Andrew in the hallway this morning and I said, I want – there is a matter involving publicity which has arisen regarding this case. I want to know from you whether you directly or indirectly in any way have precipitated any newspaper or other publicity regarding this matter. Their response, led by the husband, was, we are totally shocked that publicity concerning this case has appeared.

So, Your Honor, we know nothing about it.

THE COURT: It is an unfortunate incident and its timing is something that really irritates me. Susan Pitts came into my chambers here, I [p. 10] guess it was the morning this case started or possibly the morning after, and asked if she could read the complaint. Of course, that's public record and she is entitled to read that and we permitted her to read the complaint. We stripped the file except the last part because she didn't want anything else. She read the complaint.

I had assumed at that time that she was preparing for a write-up on this case, whichever way the jury went. Had I known of this article yesterday, prior to the time the jury was sent out to deliberate, of course I would have polled them one at a time right in the open court

and asked them if any of them had read the article, then, of course, the question whether they thought they could continue to deliberate without influence or in a totally impartial manner honestly and so forth. And then I would not have permitted them to go out in the street yesterday. I would have kept them all night, if necessary, put them up in a hotel and let them continue this morning without – I would have sequestered them.

But now that I've come to this business, I decided to let the matter roll, let the jury resume deliberation without any interference at [p. 11] this time.

I would suggest that the Defendants, if they wish to, preserve this newspaper article and anything else that they have. And, of course, you will be permitted to talk to the jurors after the case is over, as you can in every case.

I don't agree completely with Mr. Balzarini. If there is anything that sounds like that there is either jury tampering or undue influence, I think I can talk to them and inquire after they have rendered their verdict to that extent. But –

* * *

[p. 12] MR. TAYLOR: All right. Your Honor, before we leave the room, I think that for purposes of protection of my client, I should put on the record informally here in chambers a motion for a mistrial because I think this article is so prejudicial that, you know, I would be remiss if I did not do so. I would also like to put on the record these particular articles that appeared in [p. 13] the newspaper so that we can preserve the record in the event that it will be necessary to appeal this case.

Your direction and counsel with respect to how we proceed would be helpful. If you would like to have a written motion, we will certainly put something together and give it to you.

* * *

[p. 15] THE COURT: Maybe no one read it at all. Maybe you will get a defense verdict, then it becomes moot.

MR. TAYLOR: In that event, I will withdraw my motion.

MR. BALZARINI: I won't withdraw mine. I want to know how it got in there, too.

(Back in open court. Jury present.)

(At 11:30 A.M. Jury has verdict.)

THE COURT: Good morning.

THE CLERK: May I take the verdict?

THE COURT: Take the verdict.

THE CLERK: Members of the jury, have you agreed upon your answers to interrogatories?

THE JURY: We have.

THE CLERK: May I have them, please. May I read the interrogatories, Your Honor?

THE COURT: Read the interrogatories.

THE CLERK: Members of the jury, harken to the issue joined wherein Andrew Carter, a minor, by his parent and natural guardian Donald Carter, and Donald

Carter in his own right, Plaintiffs, versus the United States Steel Corporation, Defendant.

In the interrogatories to the jury, dated [p. 16] February 13, 1987, signed by Jury Foreperson Joyce M. Schneider.

Question No. 1: Do you find that the Defendant was negligent? Your answer: Yes.

Question No. 2: Was the Defendant's negligence a substantial factor in bringing about the Plaintiff's harm? Your answer: Yes.

Question No. 3: Was the Plaintiff contributorily negligent? Your answer: Yes.

Question No. 4: If you answered Question No. 3 yes, was the Plaintiff's contributory negligence a substantial factor in bringing about his harm? Your answer: No.

Question No. 5: Taking the combined negligence that was a substantial factor in bringing about the Plaintiff's harm as 100 percent, what percentage of that causal negligence was attributable to the Defendant and what percentage was attributable to the Plaintiff? Percentage of causal negligence attributable to the Defendant, 80 percent. Percentage of causal negligence attributable to the Plaintiff, 20 percent. Total, 100 percent.

Question No. 6: If you have found the Plaintiff's causal negligence to be greater than [p. 17] 50 percent, the Plaintiffs cannot recover and you should not answer Question No. 7, and you should return to the courtroom.

Question No. 7: State the amount of damages, if any, sustained by the Plaintiff as a result of the accident

without regard to and without reduction by the percentage of causal negligence, if any, that you have attributed to the Plaintiff. You answered, $1,500,000.

That is your answers to the interrogatories.

THE COURT: Members of the jury, before I dismiss you for the day, I am going to have something to say to you one at a time, some questions, and I will do that one at a time in chambers.

* * *

[p. 19] (Follwoing [sic] proceedings held in chambers.)

THE COURT: I am going to ask each juror - there's been some newspaper articles and even a television report on this yesterday evening. I want to know if this particular juror had read the newspapers or seen the television matter. They will either answer yes or no. I will write it down. Then, if they do say they have, I am going to ask them if that had any influence on their decision-making process.

MR. BALZARINI: Could we ask them, Your Honor, if they decided the case upon the evidence and the law as given to them by the Court and were able to decide it on that basis?

THE COURT: All right.

Joyce, sit down. No big problem. I am just going to ask you a couple of questions. You are from Pittsburgh 4. Where is that?

JUROR NO. 1: Sheridan, over by West End.

THE COURT: There was an article in the paper, I guess it was yesterday morning, and there was a television spot in the evening concerning this case and another case. Did you happen to read that in the paper?

[p. 20] JUROR NO. 1: No, I did not.

THE COURT: Did you see the TV?

JUROR NO. 1: I did not.

THE COURT: Very well. Thank you.

MR. TAYLOR: Did anybody else on the jury see that?

JUROR NO. 1: Yes.

MR. TAYLOR: Was it brought up in the jury room?

MR. BALZARINI: I do not think she has to disclose that.

JUROR NO. 1: I think you should ask everybody separately.

MR. BALZARINI: I think the question for her is whether she decided it on the law as given to you by the Court and the evidence produced in the courtroom?

JUROR NO. 1: It was brought up. I told them to base it on what they heard in there, because we can't put the two together because it's completely different.

MR. BALZARINI: You were the Foreperson and you instructed the jury they should decide it on the evidence produced in court.

JUROR NO. 1: Yes, what we decided [p. 21] yesterday and today.

MR. YORSZ: If we could ask the individual jurors. I have nothing for this person.

THE COURT: That is what I mean.

JUROR NO. 1: Can I ask a question?

THE COURT: Certainly.

JUROR NO. 1: I don't think anybody really knew exactly who it was that got killed up there on that tower. Was it that Chris that was with Andrew?

THE COURT: No.

MR. BALZARINI: It was another boy.

THE COURT: Totally unrelated boy.

JUROR NO. 1: That's all I wanted to know. Okay.

(Juror excused.)

THE COURT: Good morning, Mr. Gibbons. Sit down. No big problem. It has come to the attention of the Court this morning that there was an article that appeared in one of the newspapers yesterday morning and there was also a television spot on somewhere in the evening, late afternoon, concerning this case and another case. Did you read that article in the paper?

JUROR NO. 2: Judge, I'm in the process of moving and I'm too busy to be reading newspapers or [p. 22] watching television. I didn't hear a thing.

THE COURT: You did not read the newspaper?

JUROR NO. 2: No, sir.

THE COURT: Any further questions?

MR. YORSZ: You didn't read the newspaper. Did you see the film on TV?

JUROR NO. 2: I haven't saw television or the newspapers.

MR. TAYLOR: Do you recall a discussion during deliberations about the article on the television spot?

THE COURT: Were there any discussions concerning this newspaper article or the television matter?

JUROR NO. 2: When are you talking about, Judge?

THE COURT: In chambers, deliberations.

JUROR NO. 2: Yes, there was.

THE COURT: Can you give us an idea what was said?

JUROR NO. 2: Supposedly there was six children on the property down there.

THE COURT: I mean about the other case or about the newspaper. Was there any discussion about that?

[p. 23] JUROR NO. 2: Somebody being killed. That's all I heard.

THE COURT: All right.

MR. YORSZ: It was this morning?

JUROR NO. 2: Yes.

THE COURT: Mr. Balzarini, do you have anything?

MR. BALZARINI: Did you decide the case based on the evidence produced in the courtroom?

JUROR NO. 2: Absolutely.

THE COURT: You paid no attention to anything?

JUROR NO. 2: None whatsoever.

THE COURT: Very well. Thank you.

JUROR NO. 2: It doesn't have anything to do with this.

(Juror excused.)

THE COURT: Good morning, Ann Dragovich. It has come to the attention of the Court this morning that there was an article in the Pittsburgh newspaper yesterday concerning this case and another case. There was also a television release on the news concerning this case and another case. Did you read that newspaper?

JUROR NO. 3: No, I didn't. I didn't see [p. 24] the television because I went home and I died.

THE COURT: I can understand that. I did too. I woke up when that thing on television was just about over and I couldn't catch it.

JUROR NO. 3: I didn't see it and I don't think my husband seen it or any of the family because, to tell

you the truth, Judge, I don't like the news. It's always bad news.

MR. BALZARINI: I think maybe I should be allowed to ask the first question. Did you decide the case based on the law as given you by the Court and the evidence produced in the courtroom?

JUROR NO. 3: Right. I did not see it.

THE COURT: Anything further?

MR. YORSZ: No. There was discussion about it during your deliberations, though?

JUROR NO. 3: Someone had brought it up that it was on TV, but I did not see it.

THE COURT: Very well. Thank you.

(Juror excused.)

THE COURT: Good morning, Miss London. No big problem. I just want to ask you a couple of questions. It has come to the attention of the Court this morning that yesterday morning there [p. 25] was an article that appeared in the Pittsburgh newspaper concerning this case and another case. Did you read that newspaper?

JUROR NO. 4: No, I didn't.

THE COURT: There was a matter on television also.

JUROR NO. 4: I didnot [sic] see it. I didn't watch it.

MR. BALZARINI: Can I ask you, did you decide this case based on the law as given you by the Court and the evidence produced in this courtroom?

JUROR NO. 4: Yes.

MR. BALZARINI: That's all.

MR. YORSZ: Was there a discussion during your deliberations about the –

JUROR NO. 4: Yes, there was.

MR. BALZARINI: If I may interrupt. I think once the witness states – she is under oath before this Court – that she made her decision based on the law and evidence –

JUROR NO. 4: Wait a minute.

MR. BALZARINI: Other discussions become irrelevant.

JUROR NO. 4: Wait a minute. I didn't [p. 26] quite understand what you meant there. I did not read about it, nor did I see it on TV. There was a discussion about it upstairs. That did change my opinion. I have to be – yes, it did.

MR. YORSZ: I appreciate that.

THE COURT: Does anybody else have any questions?

MR. TAYLOR: No.

THE COURT: Very well. Thank you very much.

(Juror excused.)

MR. BALZARINI: I would object. I wish to make an objection on the record to any procedure which attempts to permit a jury to impeach its own verdict. That is what we are doing here.

MR. TAYLOR: You okayed it when we started.

THE COURT: The use of this is something else. What I am trying to ascertain may not be useable [sic].

Bring in Juror Number 5.

Charles Kline. Sit down. No big problem. Mr. Kline, it has come to the attention of this Court that there was a newspaper article in yesterday morning's newspaper concerning this case and another case, somewhat similar case. Did you see that article?

[p. 27] JUROR NO. 5: No, sir, not in the paper.

THE COURT: There was also a matter on the television news.

JUROR NO. 5: Yes, sir, I saw that last night.

THE COURT: You saw that?

JUROR NO. 5: Yes, sir.

THE COURT: Would you state that you rendered your verdict strictly on the law and evidence as I presented it and as was presented in this court?

JUROR NO. 5: Yes, sir.

THE COURT: Did the discussion in chambers – it has come to our attention the newspaper article and the TV spot was discussed during your deliberations.

JUROR NO. 5: Yes, sir.

THE COURT: Did that have any effect on your –

JUROR NO. 5: No sir.

MR. BALZARINI: Your Honor, I think that should be the procedure with every witness, that the Court conducts the examination and not Counsel conducting a cross-examination.

MR. YORSZ: Mr. Balzarini asked the Court [p. 28] two minutes ago to ask the first question.

THE COURT: This is an inquiry, Mr. Balzarini. That's all.

You said that did not affect your determinations at all.

JUROR NO. 5: No, sir.

THE COURT: Thank you very much.

(Juror excused.)

THE COURT: Margaret McClinton, how are you?

JUROR NO. 6: Okay.

THE COURT: Margaret, I am asking some questions concerning matters that appeared in the newspaper and on television. Yesterday morning there was an article in the newspaper pertaining to this case and another case. Did you read that newspaper?

JUROR NO. 6: No, I did not.

THE COURT: Did you see the article on television?

JUROR NO. 6: No, I didn't.

THE COURT: We understand there was some discussion in the jury room about these articles. Did you

base your verdict strictly on the law as I gave it to you and the evidence in the case?

JUROR NO. 6: Yes, I did.

[p. 29] THE COURT: And were you influenced at all by that discussion concerning the prior case?

JUROR NO. 6: Not at all.

THE COURT: Mr. Taylor, do you have any questions?

MR. TAYLOR: No.

MR. BALZARINI: Nothing, Your Honor.

THE COURT: Thank you very much.

(Juror excused.)

MR. BALZARINI: I reiterate, Your Honor, I don't think counsel should cross-examine the jurors.

THE COURT: It may never become germane.

Good morning, Miss Ritko. I have a couple of questions to ask you, no big problem, as far as the jury is concerned. We understand that yesterday morning in one of the Pittsburgh newspapers there was an article concerning this case and another case. Did you happen to see that article?

JUROR NO. 7: No, I didn't.

THE COURT: There was also something on television concerning this case and another case. Did you happen to watch television and see that?

JUROR NO. 7: No. I don't watch that [p. 30] station. I can't get it in on my TV set.

THE COURT: We understand there was some discussion about the newspaper article and TV in the jury room.

JUROR NO. 7: Yes, there was.

THE COURT: Did you base your verdict strictly on the law that I gave to you and the evidence that you heard and saw in the courtroom?

JUROR NO. 7: I based it on the law that you gave us.

THE COURT: You did?

JUROR NO. 7: Yes.

THE COURT: And the evidence that you saw an [sic] heard?

JUROR NO. 7: Yes.

THE COURT: Did that discussion concerning the newspaper article and television influence you in any way?

JUROR NO. 7: No, because I didn't see it or see anything about it.

THE COURT: All right. That's it.

(Juror excused.)

THE COURT: Good morning, Janet. Sit down. I have a couple of questions, that's all, no big deal. You live in McKeesport?

[p. 31] JUROR NO. 8: Right.

THE COURT: Do you get the suburban edition of the Pittsburgh newspapers?

JUROR NO. 8: No.

THE COURT: All right. It has come to my attention this morning that yesterday morning there was an article in the Pittsburgh paper in that south edition concerning this case and another case. Did you read that article?

JUROR NO. 8: No. But – maybe I shouldn't.

THE COURT: You should say anything that comes to your mind.

JUROR NO. 8: Okay. Yesterday at six o'clock on Channel 4 –

THE COURT: I was going to ask you that. You saw that?

JUROR NO. 8: Yes.

THE COURT: When you were in the jury room, did you base your verdict strictly on the law that I gave to you and the evidence you saw and heard in this case in the courtroom?

JUROR NO. 8: No. Yesterday, yes. Before I saw the news my verdict was different.

THE COURT: So, then, that did have some effect on your deliberation and your verdict.

[p. 32] JUROR NO. 8: Definitely.

THE COURT: Thank you very much.

MR. BALZARINI: I think maybe we should ask one other question. Was an adjudication on the question of Defendant's negligence made yesterday? Had you

answered Question 1 yesterday? Maybe you should inquire, Your Honor, if the Court will inquire.

JUROR NO. 8: I don't remember. My decision was really different yesterday before I left and when I came in this morning, it was completely different.

THE COURT: You mean when you came in or after there was discussion?

JUROR NO. 8: Well, yesterday upstairs – can I say what I –

THE COURT: I don't really want to know that. I just want to know the results, if anything, if they were reached yesterday.

JUROR NO. 8: A lot of us did reach our decisions yesterday.

THE COURT: But this morning you changed your opinion.

JUROR NO. 8: Right. I changed it when I saw the news on Channel 4 yesterday.

[p. 33] THE COURT: Very well. Thank you very much.

(Juror excused.)

THE COURT: Hello, Lana Jean. Sit down. I have a couple of questions to ask you. I see you live in Pittsburgh 2. Where is that?

JUROR NO. 9: Avalon.

THE COURT: It has come to the attention of the Court this morning that as of yesterday morning an article appeared in one of the Pittsburgh newspapers concerning this case and a not related, another case of similar nature. Did you see that?

JUROR NO. 9: No, I did not.

THE COURT: Did you happen to be watching television when they put that on last night?

JUROR NO. 9: I missed that, too.

THE COURT: I understand there was some discussion in the jury room about those news items.

JUROR NO. 9: Yes.

THE COURT: Did you base your verdict strictly on the law as I gave it to you and the evidence as you –

JUROR NO. 9: I just felt what was in the paper and on the news last night had nothing to [p. 34] do with what we were talking about, so I didn't pay no attention to it.

THE COURT: You based it strictly on the law and the evidence you heard in this case? You were not influenced by this discussion?

JUROR NO. 9: I didn't agree with the rest of them. It was eleven to one.

THE COURT: All right. That is good to know that, because they could have polled the jury and found that out. Thank you very much. That's all.

(Juror excused.)

THE COURT: Virginia Henry. Sit down. I have a couple of questions to ask you. No problem. It did come to the attention of the Court this morning that yesterday morning in the morning paper, I believe, there was an article concerning this case and a similar case. Did you read that article?

JUROR NO. 10: No, I didn't read the article but we discussed it this morning.

THE COURT: But there was also a television news item. Did you happen to see that?

JUROR NO. 10: No, but we discussed it this morning. Other ones saw it.

[p. 35] THE COURT: Did you base your verdict as you saw the case strictly on the law as I instructed you and on the evidence that you saw and heard in the courtroom?

JUROR NO. 10: I voted different yesterday than I did this morning. I changed my vote this morning.

THE COURT: What persuaded you to change your vote?

JUROR NO. 10: Hearing about the tower.

THE COURT: Anybody else have anything they want the Court to hear?

Thank you very much.

(Juror excused.)

THE COURT: Good morning, Sharon. You are from Library. It came to my attention this morning that

yesterday morning there was an article in one of the Pittsburgh papers concerning this case and another case. Did you happen to read that article?

JUROR NO. 11: No, I didn't.

THE COURT: You did not discuss that with any member of your family?

JUROR NO. 11: No.

THE COURT: Nobody called it to your [p. 36] attention?

JUROR NO. 11: No.

THE COURT: Did you happen to watch television yesterday evening when there was a news matter concerning this case and another case?

JUROR NO. 11: No.

THE COURT: We understand from some of the other jurors that there was a discussion in the jury room about that newspaper article and the television article.

JUROR NO. 11: Yes.

THE COURT: With that in mind, did you base your verdict strictly on the law as I instructed you yesterday and the evidence in my courtroom as you heard it and saw it?

JUROR NO. 11: Yes.

THE COURT: You did?

JUROR NO. 11: Yes.

THE COURT: Did that discussion about the newspaper article and television news have any effect on your delberations [sic]?

JUROR NO. 11: Not at all.

THE COURT: You felt that that had nothing to do with this case.

JUROR NO. 11: I felt that didn't.

[p. 37] THE COURT: Thank you very much.

(Juror excused.)

THE COURT: Good morning, Robert. Sit down. We have a little question or two to ask you concerning this case. You come from McKeesport?

JUROR NO. 12: Right.

THE COURT: It has come to my attention not until this morning that there was an article in one of the Pittsburgh papers or in the Pittsburgh morning paper yesterday concerning this case and another case. Did you happen to read that?

JUROR NO. 12: No, I haven't.

THE COURT: Did you see the news on television yesterday evening when this case and another case was played?

JUROR NO. 12: No, I haven't.

THE COURT: I understand there was some discussion concerning those news items in the jury room.

JUROR NO. 12: Yes.

THE COURT: With that in mind, did you base your verdict strictly on the law as I instructed you and on the evidence that you [p. 38] heard and saw in the courtroom?

JUROR NO. 12: I have.

THE COURT: Were you influenced in any way by the discussion in the jury room concerning that newspaper article and the television article?

JUROR NO. 12: No, I wasn't.

THE COURT: Thank you very much. That's all.

(Juror excused.)

(Back in open court. Jury present.)

THE COURT: There is nothing more for me to do but thank you again and wish you a safe trip home. You are dismissed. This court is adjourned. You are now able to talk about this case to anyone you want to, but you don't have to. Court's adjourned.

Members of the jury, before you leave, I am going to ask you to do something for me. When I said discuss anything about the case, I forgot to exclude that matter that we had in chambers. I brought that in chambers because that is not a public matter. I would prefer if you didn't talk to anybody about that.

(Jury is excused.)

(Following discussion held at side bar.)

[p. 39] MR. BALZARINI: Plaintiff moves the Court for imposition of delayed damages, and I will prepare a written motion and file it with the Court.

THE COURT: All right.

MR. BALZARINI: I would like the record also to reflect that it is clear that the Defendant U.S. Steel made no effort to impound pleadings regarding the death action and had the right to make application to the Court at any time.

THE COURT: Do you think Bernie McGowan would have granted that?

MR. BALZARINI: Well, if it were demonstrated that prejudicial publicity might result from either the news publication or TV publication, the details of that death action, he might very well have succeeded in impounding that complaint and having a gag order placed upon the attorney who represented the Plaintiff in that death action. They took no action of any kind.

U.S. Steel also had the right to request an instruction of the jury upon the occasion that the publication occurred and made no such request neither at any time during the entire day which preceeded [sic] today and we have to [p. 40] be mindful that that newspaper article is alleged to have be [sic] published yesterday morning and indeed the night before. We were in court all day yesterday and neither before the charge or any time before the charge has U.S. Steel requested an instruction regarding this matter, specific instruction.

However, I would point out the Court, in its instruction, did tell them to decide the case on the law and the evidence, and that ten of the jurors indicated that they had in fact decided this case on the law and the evidence as produced in this courtroom. Only two indicated that

there was some influence by extraneous matters and that would be within the five/six rule.

There was no polling taken of the jury to determine whether this verdict was unanimous or not and any failure to do so by U.S. Steel binds U.S. Steel with the verdict returned.

Any effort to impeach a jury's verdict is not permitted post-trial and any attempt by U.S. Steel to impeach the verdict of this jury by post-trial examination of the jurors is something Plaintiff objects to and participated in only because the Court indicated that a post-trial [p. 41] hearing would be held and an interrogation of the jurors.

I do not want by my presence at that hearing to indicate that I acquiesce in the attempt to impeach the jury's verdict in any way.

MR. TAYLOR: I have a few things to say, Your Honor.

First, with respect to the notice, I did not find out about the newspaper article until yesterday evening. It was called – General Counsel for U.S. Steel Corporation advised me. Debra Barnhart, who had originally been assigned to this case and who was unable to try it, had received word from one of her friends this article had been published. We took immediate action. We advised you as soon as we could with respect to it.

We are over here this morning. We filed a motion for a mistrial. The polling, as far as I'm concerned, is in connection with that original motion.

MR. BALZARINI: There was no request by U.S. Steel for a supplemental or additional instruction today.

The only request made of the Court was that a juror be withdrawn. The jury [p. 42] was deliberating. If U.S. Steel, because of the publications of which they complained, desired additional and supplemental instructions, they had the right to ask for them. They have waived that right to object because they failed to request appropriate instructions.

THE COURT: I think these arguments are going to be the subject of subsequent motions and I do not think we need to spend any more time on that.

I want to tell you this, though. Of course, you are welcome to have transcripts made of this in-chambers thing. I am going to ask both of you to keep them confidential. When we get the transcript for the Court, I am going to have it impounded and direct the Prothonotary to mark it so and keep it separate from the general record.

MR. BALZARINI: Thank you, Your Honor.

(Proceedings closed.)

COMMONWEALTH OF PENNSYLVANIA,)
) SS:
COUNTY OF ALLEGHENY)

CERTIFICATE OF REPORTER

I, Susan R. Deramo, do hereby certify that the evidence and proceedings are contained fully and accurately

in the machine shorthand notes taken by me at the hearing of the within cause, that the same were transcribed under my supervision and direction, and that this is a correct transcript of the same.

/s/ Susan R. Deramo
Official Court Reporter

The foregoing record of the proceedings upon the hearing of the above cause is hereby approved and directed to be filed.

APPENDIX K

CONSTITUTIONAL PROVISIONS

AMENDMENT XIV.

SECTION 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

AMENDMENT VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

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VOL. 7 — NO. 47 2/12/87 East Suburban Edition of The Pittsb

Good morning, East!

2 Managers need a boost

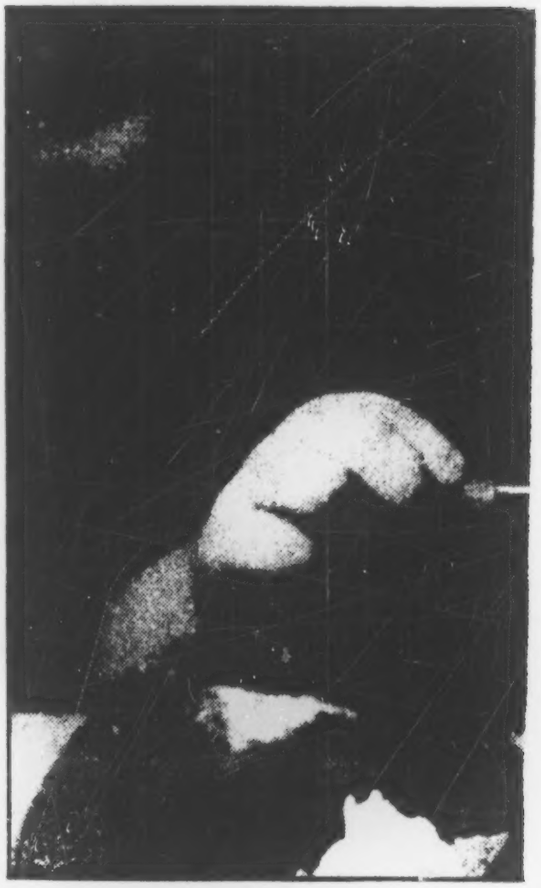
Western Pennsylvania communities in general lag far behind other places in the state in recognizing the importance of professional management, says Mary Jane Hirt, the first woman president of the Association for Pennsylvania Municipal Management. Hirt, who serves as O'Hara Township manager, says low pay, politics and poor attitudes toward managers on the part of many elected officials continue to plague the profession here.

4 Parents sue USX

Dorothy and Alfonzo Dudley of North Braddock, parents of 16-year-old Orlando who died after being electrocuted at a steel mill, are suing USX Corp. In a similar case being heard this week in Allegheny County Common Pleas Court, Donald and Andrew Carter of Swissvale are claiming negligence by USX led to the electrocution of Andrew Carter at the same mill in 1984 when he was 15.

7 Teaching fire safety

Allegheny County had 21 deaths because of fires last year, about half of whom were children. Because of this, Donald Sobel, principal of Kelly Elementary School in Wilkinsburg, volunteered his school for the "Learn Not to Burn Program." The curriculum is designed to teach



At Shenandoah Elementary School in Penn Hills, she's also got fried chicken for lunch.

Schools inv

By Jim Gallagher
Post-Gazette Staff Writer

Each Thursday night, little Heather Gold points to the school lunch menu hanging on the refrigerator and says, "Mom, don't forget. Tomorrow's pizza day! They're yummy!"

Heather leaves her lunch box at home that day. She pays 85 cents for a lunch of pizza, salad, pineapple, fudge and milk in the cafeteria of Shenandoah Elementary School in Penn Hills.

Heather's mother, Maryann, doesn't mind her daughter eating fast food, rather than more traditional fare.

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giveaway have been cut by 20.2 percent. Therefore, the communities will no longer be reimbursed for distributing surplus government commodities.

The cost "could be from a few hundred dollars to several thousand dollars per day" for the communities affected, according to Robert Callen, executive director of the Steel Valley Council of Governments.

What's involved is trucks — usually from the public works departments — and municipal employees used to man them. The trucks and workers are used to pick up the government surplus commodities and take them to distribution centers in each community. The workers also load and unload the trucks.

This generally involves one full work day each quarter when cheese, butter, rice and other items are given to needy families.

Braddock and Whitaker have not been involved in the reimbursement program, though those communities do receive free surplus food.

None of the communities has announced plans to pull out of the food giveaway program.

Officials learned of the funding cutback last Thursday at the monthly meeting of the Steel Valley Council of Governments.

A letter from the Lutheran Service Society of Western Pennsylvania, which oversees food distributions in Allegheny County, said notice of the funding cuts came from the Pennsylvania Department of Agriculture.

The Lutheran Society will still transport food to the COG's Homestead office, the letter said. And the communities have been using their own trucks and employees to pick up food at the COG office, Callen said. When the food is taken

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Residents complain of s

"The place stinks to high heaven."

That was Henry Otto's assessment of the area surrounding the Long Road sewage disposal plant in Penn Hills during the repair of a storage tank Tuesday night.

Otto, a former state legislator and a 38-year resident of Penn Hills, said he and other residents have complained that the plant is dilapidated and needs to be torn down. Tuesday night's repairs reaffirmed his beliefs.

"We are furious," he said. "The Long Road disposal plant has gone

kaput."

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Parents sue USX over boy's mill death

By Marylynne Pitz
Post-Gazette Staff Writer

The parents of a 16-year-old North Braddock boy who died after being electrocuted at a steel mill are suing USX Corp. in a case similar to one being heard this week in Allegheny County Common Pleas Court.

Dorothy and Alfonzo Dudley of 825 Jones Ave., North Braddock, claim in the suit that USX was negligent because it failed to warn Orlando Dudley of electrical dangers at its Carrie Furnace mill, which straddles the communities of Swissvale and Rankin.

The boy was electrocuted last year. The lawsuit was filed last month.

In the case being heard this week, Donald and Andrew Carter, 1227 LaClair Ave., Swissvale, are claiming negligence by USX led to the electrocution of Andrew Carter at the same mill in 1984 when he was 15.

According to the Dudley complaint, Orlando Dudley and Henry Ramsey Jr. of Swissvale entered the mill on Oct. 4 in search of copper wire.

After climbing 145 feet to a catwalk near the top of a tower, Dudley touched a hacksaw to the wire, screamed and eventually fell back onto the catwalk, Ramsey said.

Neil R. Rosen, attorney for the Dudleys, said USX was negligent in not posting danger signs at the plant. In the complaint, the Dudleys charge that USX knew the wires were dangerous because of the Carter electrocution at the mill in 1984.

The Carters' case is being heard by a jury in the courtroom of Allegheny County Common Pleas Judge Richard Zeleznik.

Their suit says that on the evening of June 1, 1984, Andrew Carter entered the plant with his friend, Christian Stonebraker.

The two boys climbed to the top of a tower. Carter lost his footing, grabbed an electrical wire and was electrocuted. His left hand was later amputated as was part of his left foot.

The Carters allege that USX failed to restrict access to the mill and also was negligent by failing to warn the public of electrical hazards existing there.

The Dudleys hope to recoup costs of their son's burial and wages he would have earned as an adult.

John Shortridge, manager of public affairs for USX, said that no other cases involving similar incidents at the Carrie Furnace mill have been filed. □

Black officer's case grows

Monroeville has until Feb. 20 to respond to state and federal inquiries concerning charges of racial harassment filed by the borough's only black police officer.

Initially, the federal Equal Employment Opportunity Commission and the state Human Relations Commission requested only that the municipality work things out with Charles Coker, the only black ever to serve on Monroeville's police force.

However, EEOC now wants to know more about Monroeville's hiring practices and procedures, Wash-

The complaint was filed late last year with EEOC, which automatically forwards such charges to the state Human Relations Commission for review. A spokesman for Human Relations said that agency could launch its own investigation if necessary.

Monroeville's public safety department also has an investigation under way. Public safety administrators are interviewing all 41 members of the police force.

John Danzilli Jr., Monroeville's

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THE PARENTS OF AN ~~ELECTROCUTED~~ 16-YEAR-OLD ARE SUING U-S-X CORPORATION.

(DON SONY VO)

ORLANDO DUDLEY DIED OCTOBER 4TH, WHEN HE TOUCHED A LIVE WIRE IN THE CARRIE FURNACE MILL. THE BRADDOCK BOY WAS SEARCHING FOR COPPER WIRE. ~~XXXXXXXXXX~~ HIS PARENTS CLAIM U-S-X ~~XX~~ WAS NEGLIGENT BECAUSE IT DID NOT WARN OF ELECTRICAL DANGERS. THEY SAY THE COMPANY SHOULD HAVE POSTED DANGER SIGNS AFTER ANOTHER BOY LOST A HAND AND PART OF HIS FOOT IN A SIMILAR 1984 ELECTROCUTION THERE!

EXHIBIT "C"

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A LAWSUIT OF THAT
INCIDENT IS BEING NOW
HEARD NOW IN ALLEGHENY
COUNTY COURT.

ACTION 4 NEWS

DIRECTOR

App. 147

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Supreme Court, U.S.
FILED
AUG 4 1992
OFFICE OF THE CLERK

(2)

No. 92-70

IN THE

Supreme Court of the United States

October Term, 1992

UNITED STATES STEEL CORPORATION,
Petitioner,

v.

ANDREW CARTER, A MINOR BY HIS PARENT AND NATURAL GUARDIAN, DONALD CARTER and DONALD CARTER IN HIS OWN RIGHT,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE ISSUES INVOLVED

I. Should the Petition for Writ of Certiorari be denied because the judgment which USX seeks to have reviewed by this Court rests upon adequate and independent state law grounds?

II. Should the Petition for Writ of Certiorari be denied because USX did not assert that a new trial was required by the Fourteenth Amendment at any stage of the proceedings in the state courts below?

III. Does the Fourteenth Amendment require that a defendant in a state civil action for negligence be granted a new trial even though the state court of last resort determined that the publicity which is the basis for the requested relief was not prejudicial?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Because the Petition for Writ of Certiorari neither accurately nor completely sets forth the material facts of record, Respondents submit the following counterstatement of the case.

* * *

This civil action for money damages was tried to a jury in a Pennsylvania trial court under Pennsylvania negligence law. On June 1, 1984, 14-year-old Andrew Carter climbed a high-voltage electrical tower located at Petitioner's (USX's) abandoned "Carrie Furnace" facility. Carter, who thought the electricity to the tower had been shut off, contacted a high-voltage electrical line and was severely burned. On the basis of Pennsylvania tort law, USX was held liable for Carter's injuries, and money damages were assessed. This amount was reduced in accordance with Pennsylvania's Comparative Negligence Act for Carter's contributory negligence.

Five days before jury selection, an article appeared in Pittsburgh's evening newspaper (*Pittsburgh Press*) concerning a lawsuit filed against USX by the parents of a 16-year-old who was electrocuted while climbing a tower in the Carrie Furnace plant. This incident occurred after Carter's injury. The article indicated that Orlando Dudley, the victim, died while attempting to steal copper wire from the plant and that USX declined comment on the lawsuit. Although USX was aware of this publicity regarding the subsequent accident at its Carrie Furnace plant at the time of jury selection in the *Carter* case, it did not conduct *voir dire* on the subject or request cautionary instructions regarding the publicity when trial began.

On the final day of the *Carter* trial, an article appeared in a suburban edition of a morning newspaper, *The Pittsburgh Post-Gazette*, regarding the lawsuit brought as a result of the subsequent accident. The article described the circumstances involving Orlando Dudley's death, stated that the Carter case was being tried, and quoted USX's Manager of Public Affairs on the subject of electrocution accidents at its abandoned Carrie Furnace plant. It was later determined that the author of the article had contacted USX's Manager of Public Affairs the day before publication to discuss the ongoing Carter trial and the lawsuit for the subsequent accident, and had informed him that she was preparing an article on the subject. (Petition for Cert., App. 16). USX's representative openly discussed both cases with the reporter. (*Id.*).

Although this article was published before the final day of trial, at no time during the day did USX request cautionary instructions, or otherwise call the publicity to the trial court's attention. The jury commenced deliberations in the afternoon, and was sent home after having completed two hours of deliberations. USX did not request cautionary instructions when the jury was discharged for the day.

USX first mentioned publicity of the subsequent accident the following morning. (Petition for Cert., App. 113). At that time, counsel for USX gave the trial judge a copy of the *Post-Gazette* article which appeared the previous morning, and stated: "We should probably bring to your attention" the *Press* article published two weeks earlier. (*Id.*). USX's counsel also informed the court that the Carter trial had been mentioned on a local television newscast the previous evening, during a brief story which summarized the *Post-Gazette* article. (*Id.*).

USX's counsel then recommended that the trial judge question each juror, *after the verdict*, as to whether the juror had read the *Post-Gazette* article regarding the subsequent accident. (Petition for Cert., App. 116). No request that the jury be given cautionary instructions was made. USX later conceded that its desire to have the jury continue deliberating to verdict without cautionary instructions was a tactical decision based on its belief that "an instruction to disregard any publicity which may or may not have been seen would have risked drawing undue attention to the matter . . ." (Brief in Support of Motion of United States Steel Corporation for Post-Trial Relief, pp. 8-9).

The jury unanimously[1] found USX liable for Carter's injuries. Over Carter's objection, the trial court then employed the procedure which USX had recommended. Each juror was summoned into chambers individually and interrogated by counsel for USX and the trial judge as to their awareness of publicity about the subsequent accident, discussion of the publicity among the jurors during deliberations, and its effect on their deliberations. (Petition for Cert., App. 122-138).

The questioning revealed that none of the jurors had read the newspaper article (*Id.*). Two jurors stated they had seen the television news story on the lawsuit arising from the subsequent accident. (Petition for Cert., App. 127, 133). Other jurors revealed that the broadcast had been discussed during deliberations. (Petition for Cert.,

[1] USX erroneously states that the verdict in this case was 11-1 (Petition for Writ of Cert., p. 8, n.3.) Its only basis for this statement is a post-verdict comment of a juror, which did not specify which of the five issues on which the jury voted was being referred to. USX did not request a poll of the jury, and the record therefore properly reflects a unanimous verdict for the plaintiff. *Commonwealth v. Jackson*, 457 Pa. 237, 324 A.2d 23 (1971); *Havranek v. Pittsburgh*, 344 Pa. 237, 324 A.2d 23 (1971).

App. 122). Two jurors[2] stated that their "opinions" changed after these discussions, but contrary to USX's misstatements, they did not indicate in what respect or on which issues their opinions had changed.[3] (Petition for Cert., App. 127, 133).

Following the verdict, USX filed a Motion for Post-Trial Relief, requesting a new trial or Judgment Notwithstanding the Verdict. Though the Motion asserted numerous trial errors and contended that the publicity of the subsequent accident had prejudiced the jury, no due process or other constitutional grounds were raised. The trial court granted USX a new trial on grounds that the publicity of the subsequent accident was "prejudicial." On appeal, a panel of the Superior Court of Pennsylvania reversed, holding that the post-verdict interrogation of the jury was an impermissible intrusion into the secrecy of its deliberations. The Superior Court condemned the process as a violation of a Pennsylvania rule prohibiting judicial consideration of post-verdict juror statements, and reversed the grant of a new trial.

[2] As with much of its Statement of the Case, USX's characterization of Juror #10's post-verdict statements is inaccurate. Juror #10 stated that he voted differently after "hearing about the tower." (Petition for Cert., App. 135).

[3] The jury's task during deliberations was to answer written interrogatories on the issues of negligence, contributory negligence, causation, and damages. There were five separate issues which the jury had to decide, and USX's presumption that the juror's post-verdict statements referred to the issue of liability is a mischaracterization of the record. The two jurors stated only that they had "changed their opinion" and "changed their vote", and gave no indication as to what issue they were referring to. USX's description of their response to the interrogation as, "blurt[ing] out they had been unable to reach a verdict based on the evidence of record after being exposed to the news account (Petition for Cert., p. 9)" is a misrepresentation of the record.

USX requested reargument before the Superior Court of Pennsylvania, *en banc*, which was granted. Again, USX did not raise due process or any other constitutional issue. The Superior Court subsequently issued three separate opinions, with three judges voting to award USX a new trial on grounds that the publicity of the subsequent accident was prejudicial, and three judges voting to reverse the new trial award. Both opinions condemned the post-verdict interrogation of the jurors as an improper intrusion into the deliberative process.

The Supreme Court of Pennsylvania accepted the case for discretionary review. In accordance with the rules of the Supreme Court of Pennsylvania, a statement of the issues for appeal was filed by each party. No due process or other constitutional issue was raised by USX. A complete record of the trial court proceedings, which included a videotape copy and transcript of the involved television broadcast, was filed with the Supreme Court of Pennsylvania. Under the Pennsylvania Rules of Appellate Procedure, USX had an opportunity to supplement this record with any materials which it deemed pertinent to the issues on appeal.

The issues raised by the appeal were extensively briefed by the parties. Again, USX's brief neither raised nor discussed a constitutional issue. At oral argument before all Justices of the Supreme Court of Pennsylvania, USX did not advance any contention that due process required the grant of a new trial. Following the argument, USX also submitted a supplemental "letter brief", which again did not advance any constitutional issue.

On March 6, 1992, the Supreme Court of Pennsylvania issued a decision reversing the grant of a new trial. USX's Statement of the Case misstates both the court's holding and the basis for its decision. The Supreme Court of Pennsylvania did not, as USX asserts, "make its own set of factual findings." (Petition for Cert., p. 11). On the contrary, the appellate court considered the television broadcast, the content of which was undisputed, and concluded that it was an accurate account of an unrelated accident which was not prejudicial.[4]

USX has carefully avoided any reference to the other grounds for the decision of the Supreme Court of Pennsylvania. In addition to concluding that publicity about the second accident was not prejudicial, the court held that since the record established that USX participated in the process of generating publicity about the subsequent accident, it was ". . . now estopped from legitimately complaining that they have been prejudiced by the jury's awareness of that publicity." (*Id.*, App. 17). In addition, the record revealed that USX made a tactical decision to refrain from calling the publicity to

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[4] USX's statement that the Pennsylvania Supreme Court "announced" a new standard for determining prejudice in Pennsylvania" inaccurate. The opinion clearly states that the standard for determining whether or not a jury in a Pennsylvania case was prejudiced by an extraneous influence, from whatever source, is always the same. The standard, which is applied objectively, is whether there is a "reasonable likelihood of prejudice." Considerations relevant to making this determination include: whether the extraneous influence relates to a central or collateral issue in the case, whether the extraneous influence provided the jury with information they did not have before them at trial, and whether the extraneous influence was emotional or inflammatory in nature. (Petition for Cert., App. 13).

the court's attention until the jury had deliberated for two hours, and then elected to receive the verdict without requesting cautionary instructions. Regarding this conduct, the court stated, "A party may not remain silent and take his chances on a verdict and then complain if it is adverse." (*Id.*).

The alleged due process issue arose only after USX realized that it had lost this case in the Supreme Court of Pennsylvania. In an effort to circumvent its failure to raise a federal question in the state courts, USX asserts that, "The true due process violation did not occur, however, until the Pennsylvania Supreme Court rendered its decision and by-passed the trial court's ruling of prejudice and order of a new trial." (*Id.*, p. 13). Significantly, USX never asserted in the Supreme Court of Pennsylvania that the court lacked appellate jurisdiction to review the grant of a new trial in this case or that the issues which it ultimately decided were otherwise not cognizable on appeal.

SUMMARY OF THE ARGUMENT

USX's Petition for Writ of Certiorari should be denied because the decision of the Supreme Court of Pennsylvania is based on adequate and independent state law grounds. The court held that USX was precluded from asserting that the publicity was prejudicial because USX participated in generating the publicity and elected to receive the verdict without requesting that the jury be given cautionary instructions. This holding rests upon the application of well-settled Pennsylvania law, and, accordingly, this Court, under its longstanding policy against reviewing state court judgments which rest upon adequate and independent state law grounds, should deny consideration of the alleged due process issue which USX raised for the first time after it lost the case in the Supreme Court of Pennsylvania.

The Pennsylvania Supreme Court decision does not address any issue of federal constitutional law because no constitutional issue was ever raised in the courts below. The decision does not conflict with prior decisions of this or any other state or federal court on an important issue of federal law, and therefore presents no special or important question warranting exercise of this Court's certiorari jurisdiction.

Even if USX's due process argument had been raised in the state courts, it would be without merit because the court below properly found that the involved publicity was not prejudicial. Since the jury was not exposed to any information which can reasonably be characterized as prejudicial, there is no basis for USX's claim that the Fourteenth Amendment mandates the grant of a new trial.

ARGUMENT

REASONS FOR DENYING THE PETITION

I. This Court should deny the Petition for Writ of Certiorari because the judgment rests upon adequate and independent state law grounds, the alleged federal constitutional issue was never raised below and is without merit since the state court below properly concluded that the involved publicity was not prejudicial.

A. This Court should deny consideration of the alleged due process issue since the judgment rests upon adequate and independent state law grounds.

In addition to determining that the involved publicity was not prejudicial, the Supreme Court of Pennsylvania held that USX could not receive a new trial since it participated in generating the publicity, counsel for USX delayed raising the publicity issue until after the jury had completed two hours of deliberations, and then elected to receive the verdict without requesting cautionary instructions. This determination results from the application of well-settled principles of *Pennsylvania* law. In accordance with a long line of this Court's decisions,[5] the judgment in the within matter is not subject to this Court's review since it rests upon adequate and independent state law grounds. The Carters respectfully submit that this is a sufficient basis for denial of USX's Petition for a Writ of Certiorari.

The rule that this Court will not review a state court judgment which rests upon an adequate and independent state ground derives from the Court's longstanding

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[5] *See, e.g., Murdock v. Memphis*, 87 U.S. 590 (20 Wall. 592, 1875); *McCoy v. Shaw*, 277 U.S. 302 (1928); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1938).

policy against issuing advisory opinions. As explained by Justice Jackson in *Herb v. Pitcairn*, 324 U.S. 117 (1935):

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. . . . Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

324 U.S. at 125-125 (*citations omitted*).

In the within case, the Pennsylvania Supreme Court held that USX's conduct precluded it from receiving a new trial. This holding is entirely independent of the determination that the publicity was *not* prejudicial, which USX contends involves a due process issue warranting this Court's review. It is readily apparent from review of the opinion that the Pennsylvania Supreme Court's decision is based on these additional state law grounds:

> The following factors are also relevant in determining whether USX should have been awarded a new trial. On February 11, 1987, while the case was still being tried, USX consented to a telephone interview with a reporter who was writing the article which appeared in the Pittsburgh Post Gazette on February 12, 1987. We do not doubt that counsel for USX was "surprised and chagrined" . . . by the appearance of the article, but we cannot impute the same surprise to their client. Having participated in the process of generating the publicity about the second accident at the Carrie

> Works, USX is now estopped from legitimately complaining that they may have been prejudiced by the jury's awareness of the publicity.
>
> * * *
>
> Additionally, . . . [w]hen the trial judge refused to conduct an immediate polling of the jury, deciding instead to "let the matter roll", counsel for USX seemingly acquiescing, made no objection nor did he request any alternative such as issuing cautionary instructions to the jury. . . . Finally, when the trial judge advised counsel for USX that the publicity issue could become moot if USX got a favorable verdict, the response by counsel for USX constituted assent to the trial judge's decision to take a wait and see attitude toward the verdict. Again, USX is estopped from legitimately complaining.

Opinion of the Supreme Court of Pennsylvania, (Petition for Cert., App. 16-17).

Each of these alternate bases for the decision result from the application of well-settled principles of law consistently applied by Pennsylvania's appellate courts. Pennsylvania's appellate courts have long recognized a party's obligation to *immediately* bring to the trial court's attention any publicity which the party asserts may be prejudicial, and that failure to do so precludes a request for a new trial based on the publicity. *Commonwealth v. Clay*, 56 Pa.Super. 427 (1914). Similarly, Pennsylvania's appellate courts have consistently applied the rule that a party who participates in exposing the jury to an allegedly prejudicial matter may not receive a new trial based on the event. *Ellsworth v. Lauth*, 311 Pa. 286, 166 A. 855 (1933).

USX participated in generating publicity about the subsequent accident during the Carter trial to a point where its Manager of Public Affairs was quoted in a newspaper article characterizing the cases as "similar". Much of the resulting publicity was unfavorable *to the plaintiff* since it implied that Carter's purpose in entering the mill was to steal valuable supplies. USX assumed the risk of publicity reaching the jury when it openly discussed this case with media representatives during trial.

Similarly, its failure to promptly notify the trial court when USX learned that publicity about the Carter case and the subsequent accident was imminent was properly held to constitute a waiver of any claim of prejudice. Despite knowledge several days in advance that a detailed news account discussing the Carter case and the subsequent accident would be published, USX never raised the matter with the trial court until after the jury had completed two hours of deliberations. Significantly, the trial judge stated that he would have taken steps to insure that the jury was not exposed to any publicity regarding the case if he had known the newspaper article would be published. (Petition for Cert., App. 117-118).

Upon learning of the publicity, counsel for USX did not request cautionary instructions. In its briefs filed in the state courts, counsel for USX explained this failure as a desire to "avoid drawing undue attention to the matter". *Brief in Support of Motion for Post-trial Relief,* pp. 8-9). However, counsel for USX suggested the procedure adopted by the trial court whereby the jury would continue deliberations without cautionary instructions and USX would be permitted to inquire whether any juror was exposed to the news items

only if a verdict was returned for the plaintiff.[6] This demonstrates that USX had elected to gamble on a defense verdict, and wished to hold the publicity issue in reserve in the event of an unfavorable verdict.

A long line of Pennsylvania appellate decisions hold that a party may not gamble on a verdict and later seek a new trial based upon an allegedly prejudicial occurrence during trial. *Tagnani v. Lew*, 493 Pa. 371, 426 A.2d 595 (1981); *Commonwealth v. Mehlman*, 163 Pa.Super. 534, 63 A.2d 400 (1949); *Pratt v. Stein*, 298 Pa.Super. 92, 444 A.2d 674 (1982). The Pennsylvania Supreme Court concluded that this is precisely what USX did in the present case, and properly held that its decision to receive a verdict without requesting cautionary instructions barred it from receiving a new trial under these applicable state law decisions.

USX completely ignores these alternative state law grounds, and fails to address decisions of this Court which preclude certiorari in such situations. Because the decision of the Supreme Court of Pennsylvania rests upon bona fide state law grounds entirely independent from the holding that the publicity was not prejudicial, it is respectfully submitted that this Honorable Court should deny further consideration of USX's Petition. *Herb v. Pitcairn, supra.*

B. The Petition should be denied because no federal constitutional issue was raised by USX in the state courts below.

This Court has repeatedly held that the federal issues must first be presented to the state courts to be preserved for review on writ of certiorari. *Pickering v.*

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[6] *See, Transcript of In-chambers Proceedings,* Petition for Cert., App. 116.

Board of Ed. of Township High School Dist. 205, Will County, Illinois, 391 U.S. 563 (1968); *Webb v. Webb*, 451 U.S. 493 (1981). This rule is founded upon important considerations of comity, which dictate that state courts must first be afforded an opportunity to consider challenges to official state acts based upon the federal constitution before this Court will review the decision. *Webb*, 451 U.S. at 499-500.

Due to these important policy considerations, this Court has stated that the record from the state court must *plainly* show that a federal issue was raised and considered in the state courts before this Court will grant review of the state court judgment. *Id.*, pp. 501-2. More recently, this Court held that mere general references to the Constitution are insufficient to preserve constitutional issues for review on writ of certiorari, stating:

> A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon.

Banker's Life Ins. Co. v. Crenshaw, 486 U.S. 71, 77 (1988).

This Court's procedural rules are equally clear that alleged federal issues must be presented to the state court to preserve an issue for Supreme Court review. Specifically, any party seeking review of a state court judgment must:

> . . . specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; with such pertinent quotation of specific

> portions of the record where the matter appears . . . *as will how that the federal question sought to be reviewed was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.*

U.S. Sup. Ct. Rule 14.1 (h) (*emphasis added*).

Review of USX's post-trial motions filed in the trial court and its subsequent briefs and petitions demonstrates that no federal constitutional issue was ever presented to any state court at any stage in the proceedings. Similarly, USX's claim that the Fourteenth Amendment requires that it be granted a new trial was not considered or discussed in any of the opinions of the courts below. USX first raised the issue in its Petition for Writ of Certiorari. In accordance with the applicable rules and decisions of this Court, it is respectfully submitted that this Honorable Court should deny review of the within judgment since USX did not raise any federal constitutional issue in the state courts.

C. Neither the record nor applicable precedent supports USX's claim that it was denied due process of law by the Supreme Court of Pennsylvania.

In an attempt to avoid the consequences of its failure to raise any constitutional issue in the state courts, USX argues that the claimed denial of its due process rights occurred when the Pennsylvania Supreme Court held that the publicity at issue was not prejudicial. USX contends that the Fourteenth Amendment required that the Pennsylvania Supreme Court order a new trial or, in the alternative, accept the trial judge's conclusion as to whether the publicity was prejudicial.

USX does not cite any authority which holds that the Fourteenth Amendment requires a state appellate court to accept a trial court's finding of prejudice. This Court

does not recognize similar constitutional limitations on its scope of appellate review over decisions by the federal district courts. For example, in *Marshall v. United States*, 360 U.S. 310 (1959), this Court reversed a federal district trial court's finding that a news article was not prejudicial. The Court independently reviewed the content of the publicity and reversed the trial court's finding, noting that its power to do so arises from its "supervisory authority" over the federal district courts. 360 U.S. 313.

The Pennsylvania Supreme Court exercises similar supervisory authority over state trial courts, and routinely conducts independent reviews of trial judges' determinations as to whether matters arising during trial justify the award of a new trial. *See, e.g., Commonwealth v. Santiago*, 465 Pa. 265, 318 A.2d 737 (1974); *Commonwealth v. Williams*, 514 Pa. 62, 522 A.2d 1058 (1987). The determination of whether to grant or refuse a new trial is a question of law which is appropriately subject to review by a state appellate court. Just as this Court is not constitutionally powerless to review the grant or refusal of a new trial by the district courts, the Pennsylvania Supreme Court's exercise of its supervisory authority does not violate due process rights.

USX was afforded a full and fair opportunity to challenge the jury verdict against it. It was permitted to conduct a post-trial jury interrogation to discover whether any juror was aware of the publicity. It filed post-trial motions challenging the verdict pursuant to Pennsylvania's Rules of Civil Procedure, submitted briefs and participated in oral argument on its motions in the trial court, and subsequently before three separate appellate courts.

This Court, in the context of reviewing a state court criminal judgment in which the defendant claimed that due process required a new trial due to juror misconduct and partiality, held that a post-trial inquiry to determine whether a new trial was required adequately protected the defendant's Fourteenth Amendment rights. *Phillips v. Smith*, 455 U.S. 209 (1982). In *Phillips*, the Court noted that since a post-trial hearing to consider a claim of juror bias is constitutionally sufficient in the federal system, "... the Due Process Clause of the Fourteenth Amendment cannot possibly require more of a state court system." 455 U.S. at 218. It follows, therefore, that procedures sufficient to afford due process in a criminal trial are adequate for a state civil trial.

There is no conceivable violation of due process by the Pennsylvania Supreme Court's consideration or resolution of the within matter. USX's assertions to the contrary are merely an attempt to avoid the consequences of its failure to preserve an issue for this Court's review, and are advanced without citation or discussion of any relevant authority. Accordingly, it is respectfully submitted that USX's Petition does not present any federal question, much less a special and important federal question which would merit this Court's consideration.

D. USX's claim that the Fourteenth Amendment requires a new trial is without merit since the court below properly concluded that the publicity was not prejudicial.

Even if USX had raised a Fourteenth Amendment issue concerning the jury's exposure to the publicity in the state courts, the claim would be groundless since the Supreme Court of Pennsylvania gave thorough consideration to the contention and found that the

publicity was not prejudicial. USX's dissatisfaction with this holding does not make the decision unconstitutional or create a basis for this Court's review.

The involved newscast was a brief, accurate account of the filing of an unrelated lawsuit. As the Pennsylvania Supreme Court determined, it contained no new information about the Carter case not already known to the jury. *See,* Petition for Cert., App. 15. The only reference to the Carter case was a statement that a lawsuit was ongoing, and a reference to the fact that USX did not take precautions to prevent others from climbing the tower after Carter's accident.

This was not new information to the jury. At trial, USX admitted that safety precautions to prevent the accident were feasible, but argued to the jury that they were unnecessary since the danger of climbing the involved transmission tower was obvious. The jury saw numerous photographs of the tower, visited the scene on a court-approved view, and was aware that USX had not taken precautions to prevent access to the tower. Of course, this was entirely consistent with USX's trial posture that barricades or warnings were unnecessary, and that Carter's injuries were caused by his own negligence in climbing the tower.

The Pennsylvania Supreme Court concluded that the information concerning the subsequent accident was not conveyed in an inflammatory manner and did not require a new trial because the jury was instructed to base its verdict solely on the law and evidence presented in court.[7] This conclusion is understandable since the subsequent accident was admissible evidence under

[7] *Opinion of Pennsylvania Supreme Court,* Petition for Cert., App. 16.

Pennsylvania law. *Yoffe v. Pennsylvania Power & Light Co.*, 385 Pa. 520, 123 A.2d 636 (1956), holds that evidence of a subsequent accident is admissible to show that a dangerous condition was not obvious to a plaintiff.

This Court has held that not every exposure of a juror to extraneous information requires a new trial as a matter of constitutional law. *Rushen v. Spain*, 464 U.S. 114, *reh'g denied*, 465 U.S. 1055 (1984). In *Rushen*, this Court held that where a state court finds that a juror was exposed to extraneous information and communicated the information to other jurors, but determines that the information was not prejudicial, the refusal to award a new trial is not unconstitutional. Similarly, since the state court in the present case determined that the publicity was not prejudicial, the Fourteenth Amendment does not require a new trial.

USX's reliance upon *Remmer v. United States*, 347 U.S. 227 (1954) is misplaced. *Remmer* involved a federal criminal trial in which an unidentified individual contacted and attempted to bribe a juror in exchange for a vote for acquittal. The rule established there, which USX erroneously asserts is applicable in the present case, is that improper contacts with jurors by *third persons* are presumed to be prejudicial. No such contact occurred in the present case. Moreover, *Remmer* holds that a hearing to determine prejudice is all that is required by the Fourteenth Amendment, which USX received in the instant case.

USX's reliance upon *Mattox v. United States*, 146 U.S. 140 (1892) is also misplaced. *Mattox* involved another improper contact calculated to influence the jury; in that instance by a court bailiff. The information at issue in that case was of a type uniformly held inadmissible for

any purpose in murder prosecutions due to its non-probative and highly inflammatory character. In contrast, the information in the present case was either admissible evidence or already known to the jury, and was not conveyed by an individual attempting to influence the verdict.

All issues which were raised by USX in the state courts received full and careful consideration. The Supreme Court of Pennsylvania, after thorough review of the record and the contents of the involved publicity, determined that it did not warrant the grant of a new trial and held that USX's conduct precluded it from obtaining the relief it requested. No federal constitutional issue was ever raised or considered by the state courts. While this alone is sufficient reason to deny the Petition, it further presents no special or important issue warranting this Court's review. Accordingly, it is respectfully submitted that USX's Petition should be denied.

CONCLUSION

For the above-stated reasons, it is respectfully requested that this Honorable Court enter an Order denying USX's Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 26 1992
OFFICE OF THE CLERK

No. 92-70

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES STEEL CORPORATION,

Petitioner,

v.

ANDREW CARTER, A MINOR BY HIS PARENT AND NATURAL GUARDIAN, DONALD CARTER AND DONALD CARTER IN HIS OWN RIGHT,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

REPLY BRIEF

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REPLY BRIEF

I. FACTUAL MISSTATEMENTS BY RESPONDENT

A number of misstatements appear in the Brief in Opposition to Petition for Writ of Certiorari, filed by Respondent in the instant case, which relate to facts critical to this Court's determination of the certiorari Petition. These will be addressed in summary fashion, in order to ensure that the Court is aware of the accurate facts as reflected in the Appendix.

1. Respondents have stated in several portions of their Brief that it was counsel for U.S. Steel who recommended that the trial judge question each juror *after* the verdict had been reached, and generally "suggested the procedure adopted by the trial court" with respect to the jury's improper exposure to media reports. (Brief in Opposition at 3, 12). This is false. The record makes clear that counsel for U.S. Steel requested that the jury be polled *immediately* upon discovery of the prejudicial news account. (App. 115-117). Indeed, the record indicates that it was Respondents' attorney who argued that the jury could not be interrupted because they had commenced deliberations, and urged the judge to postpone the inquiry. (App. 116). Moreover, the record is abundantly clear that it was the trial judge who ultimately dictated the procedure to be followed; not counsel for U.S. Steel. (App. 115-119).

2. Respondents state that the jury "unanimously" found USX liable. (Brief in Opposition at 4). This is incorrect, as discussed at length in the Petition for Writ of Certiorari at p. 8 and n.3.[1]

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[1] To suggest that the jurors never made explicit on which "issue" they had changed their minds is insulting to the intelligence of all concerned. The record clearly reflects that the jurors in question changed their votes as to liability, and expressed this fact to the trial judge. *Id.*

3. Respondents incorrectly state that U.S. Steel made a "tactical" decision to refrain from requesting cautionary instructions. (Brief in Opposition at 3, 12). In support of this proposition Respondents cite a source not in the record, and not in the Appendix, in violation of Rules 15 and 24 of this Court. In fact, no such "tactical" decision was made. The trial court made clear what procedure would be followed with respect to the jury's exposure to media reports, and clearly indicated that cautionary instructions over and above his general instructions would serve no useful purpose. (App. 115-119). Moreover, his conclusion proved to be accurate, since the jurors themselves indicated that they understood they were not to consider extraneous information from the media, yet did so despite the judge's instructions. (App. 121-138).

4. Respondents represent that counsel for U.S. Steel failed to "promptly notify the trial court" when he learned of the prejudicial publicity. (Brief in Opposition at 12). This is not true. The record is unequivocal that counsel immediately raised the issue of the prejudicial newspaper report and news broadcast as soon as he learned of them. (App. 112-115). No court at any level in these proceedings has ever questioned this fact; it is incredible that Respondents now seek to inject such a misstatement into the record.

5. Respondents state that the information concerning the subsequent accident at the U.S. Steel facility (in which Orlando Dugley was killed by electrocution) was "admissible under Pennsylvania law." (Brief in Opposition at 18-19). This is inaccurate and misleading. Such evidence was specifically deemed inadmissible in this case. The trial judge explicitly found that evidence of the Dudley accident would be prejudicial to the jury, and excluded such evidence at trial. *See* Petition for Writ of Certiorari at 9; App. at 85; 107-111.

6. Respondents suggest that the news account was not prejudicial because the jury was already aware of everything portrayed in the television broadcast, from its

view of the accident site. (Brief in Opposition at 18). This simply is not true. As the trial judge was acutely aware – in rejecting a similar argument at the post-trial stage – the words and images contained in the WTAE newscast were saturated with potentially inflammatory information. First, it informed the jury in graphic fashion that a boy had been killed on a virtually identical tower. Second, it improperly reinforced in the jurors' minds that U.S. Steel had taken no corrective measures at the Carrie Furnace site to prevent future accidents, a fact which the trial judge knew to be false.[2]

Respondents' mischaracterizations of the factual record, although tolerated with a certain impunity in the lower courts, cannot be countenanced at this level. To the extent that the above facts are critical to this Courts' proper determination as to whether certiorari is appropriate, it is essential that the facts of record be accurately conveyed.

II. "ADEQUATE AND INDEPENDENT STATE GROUNDS" ISSUE

Respondents argue at length that the Petition for Writ of Certiorari should be denied because the judgment rests upon "adequate and independent state law grounds." (Brief in Opposition at 9-13). This argument is misplaced, and overlooks the leading decision of this Court on the subject.

First, what two Justices of the Pennsylvania Supreme Court off-handedly mention as "factors" bolstering the majority opinion, hardly constitute "adequate and independent state grounds" sufficient to strip this Court of jurisdiction. The first additional "factor" cited – that an employee of USX had spoken with a newspaper reporter

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[2] The trial judge was aware that U.S. Steel had constructed metal barriers at the base of the towers, but these had been removed by Orlando Dudley before he was electrocuted. This fact had been withheld from the jury at the time they viewed the site. Thus, the television broadcast only exacerbated the situation.

concerning an earlier, innocuous news account – is wholly irrelevant. As made clear by the jurors and the trial judge, the prejudice in this case flowed from the *television broadcast* appearing on WTAE TV; not the newspaper account.

The second additional "factor" mentioned by the same two Justices – that U.S. Steel was somehow "estopped" from raising the prejudicial impact of the television broadcast upon the jury, because the trial judge had determined to "let the matter roll" – is likewise irrelevant. First, as the dissent points out, counsel for U.S. Steel had no choice. (App. 22-23). Once the trial judge issued his ruling, there was nothing further that counsel for U.S. Steel could (or should) have done. *Id.* Second, the trial judge clearly did not view the issue as being "waived," since he went on to conduct an inquiry and find that the jury panel was unconstitutionally prejudiced.

Finally, and most significantly, the issue of "waiver" or "estoppel" is a red herring. The trial judge established a procedure to determine if the jury had been prejudiced; he found a violation of due process; he ordered a new trial. Such a constitutional violation as found by the trier of fact cannot be erased by a declaration that defendant somehow "should have done more." At the point where the judge elected to follow a particular procedure based upon his own best judgment, the conduct of counsel for U.S. Steel became legally irrelevant. The trial court found that the jury panel was tainted – through his own inquiry designed to ensure that a fair trial had been conducted – and this fact is clearly emblazoned in the record. No postscript by two of the seven Justices of the Pennsylvania Supreme Court can now change that fact. A mere assertion that U.S. Steel "might have done something differently," cannot eliminate the federal constitutional violation found by the trial judge, or shield it from review by this Court.

In support of its "adequate and independent state law grounds" argument, Respondents cite *Murdoch v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874) and *Herb v.*

Pitcairn, 324 U.S. 117 (1945). These early cases stand for the proposition, generally, that this Court may not reach a federal issue where the decision of the state court stands on an independent foundation supported by its own state law.

Respondents, however, fail to cite *Michigan v. Long*, 463 U.S. 1032 (1983), the most recent pronouncement by this Court which significantly altered the modern jurisprudence surrounding the adequate and independent state grounds doctrine. *Murdoch, Herb*, and cases of that genre essentially *presumed* that a state court rested its decision upon state law, whenever a doubt existed. *See, generally*, Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977 (1985). However, *Michigan v. Long* essentially switched this presumption, and now requires that state court (in the words of Justice O'Connor) make a "plain statement" that the judgment relies exclusively upon independent state grounds. *Id.* at 1040-1041. Otherwise, the Supreme Court may reasonably conclude that it is authorized to exercise federal jurisdiction, particularly where mixed references to federal and state law exist. *Id.* at 1041-1042.

In the instant case (as discussed *infra*), the Pennsylvania courts continuously discussed the issues of "prejudice" and impartiality" as if they were mixed questions of state and federal law. Under Pennsylvania case-law, the right to an "impartial jury" has consistently been located in intermingled references to the Pennsylvania Constitution and the Due Process Clause of the Fourteenth Amendment, implicating both of these provisions. *See e.g., Commonwealth v. Brown*, 231 Pa.Super. 431, 435, 332 A.2d 828, 830-831 (1974); *Commonwealth v. Williams*, 262 Pa.Super. 508, 396 A.2d 1286 (1978), *rev'd on other grounds*, 494 Pa. 496, 431 A.2d 964 (1981); *Commonwealth v. Stewart*, 449 Pa. 50, 52, 295 A.2d 303, 303-306 (1972), *cert. denied*, 417 U.S. 949 (1974).

In the case at bar, the Pennsylvania Supreme Court derived its test regarding the "prejudicial" nature of the

television news account from both state and federal sources. (App. 11). Significantly, the Pennsylvania Supreme Court relied upon a federal decision – *Owen v. Duckworth*, 727 F.2d 643 (7th Cir. 1984) – in crafting its definition of "prejudice." *Id. Owen* is a leading federal decision from the 7th Circuit dealing with the right to an impartial jury, which rests squarely upon the Due Process Clause of the 14th Amendment. *See Owen*, 727 F.2d at 645.

In sum, the "adequate and independent state grounds" doctrine does nothing to militate against granting certiorari in the instant case. To the contrary, the state "grounds" relied upon by two Justices of the Pennsylvania Court were tangential at best. Moreover, even if anything approaching a substantial state question was addressed, any such question was inextricably intertwined with federal law.

III. THE FEDERAL DUE PROCESS ISSUE WAS CLEARLY RAISED BELOW

Respondents also assert that certiorari must be denied because the federal due process issue was never presented "to any state court at any stage in the proceeding." (Brief in Opposition at 15). This is perhaps the most serious misstatement of the Brief. Indeed, it presents an additional reason weighing in favor of this Court granting certiorari. If any doubt truly exists on this matter, which Petitioner disputes, this Court must clarify the federal law which governs the specificity with which a party must preserve a federal constitutional issue.

It has long been held that this Court's jurisdiction "does not depend on citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 113-114 n.9 (1982). So long as the record as a whole shows expressly or by clear intendment that the federal claim was brought to the attention of the state court with fair precision, "the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). *See also,*

STERN, GRESSMAN & SHAPIRO, SUPREME COURT PRACTICE 146 (6th Ed. 1986).

The lower courts in this case originally dealt with the due process issue in terms of "prejudice" and lack of "impartiality". These concepts are inextricably tied up (in Pennsylvania law) with the guaranty of due process under the Fourteenth Amendment. *See, e.g., Brown, Williams* and *Stewart, supra.* Moreover, Petitioner explicitly raised the constitutional claim in terms of an "impermissible denial of due process" (App. 92-99) at the first opportunity available; to wit, when the Pennsylvania Supreme Court by-passed the ruling of the trial court and stripped U.S. Steel of the right to an impartial jury trial. *Id.* At that critical point, U.S. Steel immediately raised the federal due process issue in its application for re-argument.

A number of decisions of this Court have approved of such broadly-worded Constitutional language, holding it to be adequate to preserve a federal question. *See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 159 n.5 (1980) (generalized "due process" arguments sufficient); *Taylor v. Kentucky,* 436 U.S. 478, 482 n.10 (1978) (invoking "fundamental principles of judicial fair play" should have "sufficed to alert the trial judge to petitioner's reliance on due process principles"); *Braniff Airways v. Nebraska State Board,* 347 U.S. 590, 598-99 (1954), *reh'g denied,* 348 U.S. 852 (1954) ("(t)hough inexplicit, we consider the due process issue within the clear intendment of his contention and hold such issue sufficiently presented"); *Bryant v. Zimmerman, supra,* 278 U.S. at 68 (asserting that the statute "deprived (petitioner) of his liberty without due process of law. . . . " was sufficient).

More importantly, this Court has made clear that where the federal constitutional question is created by an "unexpected decision" of the state supreme court, the petition for rehearing "constitutes the appellant's first and probably only chance to present the matter to that court." In such a situation as here, it is well accepted that the federal issue may properly be raised for the first time

in the petition for rehearing. STERN, GRESSMAN & SHAPIRO, *supra* at 156; *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-78 (1930); *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, 85-86 n.9 (1980) (Rehnquist, J.). The federal question will be deemed timely raised and will justify the exercise of the Supreme Court's jurisdiction, even though the petition for rehearing is summarily denied. STERN, GRESSMAN & SHAPIRO, *supra*. at 156.

In the instant case, the federal due process issue was raised explicitly by Petitioner as soon as the Pennsylvania Supreme Court issued its opinion denying due process. Moreover, the federal due process issue was already in the case – albeit expressed in generalized terms – to the extent that the lower Pennsylvania courts had addressed the "impartiality" and "prejudice" concepts, which by tradition have merged federal due process notions into the fabric of Pennsylvania law.

To the extent that there is any serious question concerning the proper raising of the federal due process issue, Petitioner vigorously contends that this issue provides yet a second reason for this Court to grant certiorari. Although a sprinkling of early 20th century cases suggest that the Court must look with a harsh eye at any Petition in which the applicable federal provision has not been cited by chapter and verse below, this is clearly not the direction of more recent pronouncements of this Court. Where any ambiguity exists, Petitioner believes that *Michigan v. Long* now dictates that the presumption must be made in favor of preserving the federal question and permitting review. To the extent that this issue regarding the Court's jurisdiction may require clarification, Petition asserts that certiorari is doubly appropriate.

IV. MISCELLANEOUS ISSUES

Respondent ultimately seeks to justify the denial of federal due process in this case by arguing that the Pennsylvania Supreme Court was simply exercising its "supervisory authority" over the trial court, when it overturned

the lower court's finding of prejudice. The Pennsylvania Supreme Court, according to Respondents, simply decided this matter as a "question of law." (Brief in Opposition at 16).

Such an analysis misses the mark. This Court has made clear that a state trial judge's determination as to prejudice is a factual finding, entitled to great deference. *Rushen v. Spain*, 464 U.S. 114, 120 (1983), *reh'g denied*, 465 U.S. 1055 (1984); *Patton v. Yount*, 467 U.S. 1025, 1037 n.12 (1984). The trial judge and jury are the "closest to the scene of events," which is an "undeniable advantage over any appellate tribunal." STERN, GRESSMAN & SHAPIRO, *supra* at 181. Where a federal right has been denied as a result of a finding by the state court unsupported by the record, this Court has not hesitated, and should not hesitate, to exercise its power to review the factual record. *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927).

If this Court is to meet its Constitutional responsibility, it cannot permit itself to be "completely bound by state court determination[s] of an issue essential to [a] decision of a claim of federal right, [or] else federal law could be frustrated by distorted fact finding." *Stein v. New York*, 346 U.S. 156, 181 (1953), *overruled on other grounds*, 378 U.S. 368, 391 (1964).

Respondent is forced to argue, in the end, that Petitioner received due process in this case because "(i)t was permitted to conduct a post-trial interrogation to discover whether any juror was aware of the publicity." (Brief in Opposition at 16). This analysis is quite ironic. Because it is by virtue of precisely this sort of post-trial inquiry that the jurors, the trial court, and the Superior Court all agreed that Petitioner was unconstitutionally prejudiced, and that a new trial was mandated. Part of the process which is now due U.S. Steel is that the *ad hoc* appellate fact-finding engaged in by the Pennsylvania Supreme Court – which stripped Petitioner of its 14th Amendment rights – must be subject to review by this Court, and overturned if it does not comport with the United States Constitution.

V. CONCLUSION

For all of the reasons set forth above, Petitioner U.S. Steel respectfully submits that two distinct reasons now exist which justify this Court's granting certiorari with respect to Petition.

Respectfully submitted,

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